FILE COPY

Office - Supreme Court, U. S.
FILED
JAN 12 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 329.

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS, and JOHN P. WING, co-partners doing business under the firm name of RUSSELL, MILLER AND CAREY, and SAMUEL A. PLEASANTS,

Petitioners,

against

JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, co-partners doing business under the firm name of J. S. TODD & CO., on behalf of themselves and all other creditors of THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO,

Respondents,

and

HOWARD Y. LISSENDEN, HENRY TRUXTON EMERSON, WILLARD C. WEISS and ALEX LOWENTHAL, as Members of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Committee,

Intervenors-Respondents.

On a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR RESPONDENTS AND INTERVENORS-RESPONDENTS.

GEORGE A. SPIEGELBERG,
Counsel for Respondents and Intervenors-Respondents.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

TABLE OF CONTENTS.

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3, Appendix, p. xiv
STATEMENT OF THE CASE	3
DECISIONS OF THE DISTRICT COURT	6
DECISION OF THE CIRCUIT COURT OF APPEALS	6
POINT I. The statute in question is solely cognizable in equity	7
POINT II. Federal equity jurisdiction has always been, and still is, uniform through the Federal Courts of the United States and is unaffected by State statute or decision	11
A. Federal Courts of equity will apply State law only where there is involved an issue which is local or where a question of general common law arises in an equitable cause	13
B. The doctrine of the Erie and Ruhlin cases are applicable only where the Federal jurisdiction is based on diversity of citizenship. Where, as here, Federal jurisdiction is based upon an Act of Congress adopted within its constitutional power, the doctrine of those cases has no application	14

PAGE

C. If a Federal District Court in equity interpreting and applying a Federal statute is bound by the New York law of legal limitations, the result will be either to judicially legislate 28 U. S. C. A. 723 out of existence or arrive at the conclusion that such actions can be brought at any time 21

POINT III. Laches is a remedial doctrine exclusively equitable and unknown to the law. Where there is no legal remedy laches alone applies. Where there is adequate legal remedy (the concurrent equitable jurisdiction) Federal Courts of equity apply laches by analogy to State statutes of limitations 23

POINT IV. If the cause of action here sued upon interpreted as it has been in this Court were sued upon in the Courts of the State of New York, that State would apply the ten year statute, and if the law in that State is here applicable, this Court will apply the same statute 28

A. Irrespective of the special nature of the New York statute of limitations, in New York all causes solely cognizable in equity and all causes where an inadequate remedy exists at law are, and always have been, governed by New York Civil Practice Act Section 53, the ten year statute 32

B. In New York a stockholder liability statute enforcible only by creditors in a representative action is necessarily exclusively equitable 41

POINT V. Petitioners' Brief 42

POINT VI. Conclusion 58

APPENDIX.

PAGE

A-1. Legislative history of New York statutes of limitations i

A-2. In New York it is the unvarying rule that even though there be a right at law, if equity affords the only adequate remedy, the ten year statute is applicable. Development of two theories of adequate remedy solely in equity. Survival of theory that no one has adequate remedy at law, ten year statute applicable even though basic cause of action legal v

A-3. Statutes involved xiv

Table of Cases.

	PAGE
Alsop v. *Conway*, 188 Fed. 568, certiorari denied 223 U. S. 720	8, 30
Anderson v. *Abbott*, 23 F. Supp. 265	45
Appleby v. *Brown*, 24 N. Y. 143	vi, viii, x
Arnson v. *Murphy*, 109 U. S. 238	20
Atlas Life Insurance Co. v. *Southern*, 83 Law Ed. 755	13
Bacon v. *Howard*, 20 How. 22	57
Badger v. *Badger*, 2 Wall. 87	24
Baker v. *Cummings*, 169 U. S. 189	24
Barber v. *Barber*, 21 How. 582	29
Benedict v. *City of New York*, 250 U. S. 321	27
Bernheimer v. *Converse*, 206 U. S. 516	10
Biltrite Building Co. v. *Elliott*, 166 S. C. 534	45
Boone County v. *Burlington*, 139 U. S. 684	57
Boyle v. *Zacharie*, 6 Pet. 648	11, 12
Bradford v. *Chase National Bank of City of New York*, 24 F. Supp. 28	18
Branchville Motor Co. v. *Adden*, 158 S. C. 90	45
Brinkerhoff v. *Bostwick*, 88 N. Y. 92	v, vii, viii, ix, x, xi, xii
Brinkerhoff v. *Bostwick*, 99 N. Y. 185	v, viii, ix, x, xi, xii
Brinkerhoff v. *Bostwick*, 105 N. Y. 567	v, viii, ix, x, xi, xii
Brusselback v. *Cago Corporation*, 85 F. (2d) 20	8
Brusselback v. *Chicago Joint Stock Land Bank*, 85 F. (2d) 617, certiorari denied, 299 U. S. 615	17
Burrill v. *Locomobile Co.*, 258 U. S. 34	11
Cago Corporation v. *Brusselback*, 85 F. (2d) 20, certiorari denied, 299 U. S. 586	27, 28, 38, 49, xiii
Campbell v. *Holt*, 115 U. S. 620	21
Carroll v. *Green*, 92 U. S. 509	55, 56, 57
Cates v. *Allen*, 149 U. S. 451	26
Central Vermont R. Co. v. *White*, 238 U. S. 507	49

PAGE

Chance v. *Guaranty Trust Co.*, 251 App. Div. 855.... 34, 39, x
Chance v. *Guaranty Trust Co.*, 256 App. Div. 841..... 37
Chorrmann v. *Bachmann*, 119 App. Div. 146..... 34
Christopher v. *Brusselback*, 302 U. S. 500.....7, 10, 52, xiii
City Service Oil Co. v. *Dunlap*, 84 L. Ed. 185.....15, 48, 49
Clarke v. *Boorman's Executors*, 18 Wall. 493..... 57
Clarke v. *Gilmore*, 149 App. Div. 445..... 34
Matter of Crowley, 167 Misc. 840..... 34
Curtis v. *Connly*, 257 U. S. 260..... 54
Cwerdinski v. *Bent*, 256 App. Div. 612, affirmed November 14, 1939.....38, xiii

Davis v. *Cohn*, 256 App. Div. 905..... 47
Davis v. *Mills*, 194 U. S. 451..... 21
Downey v. *City of Yonkers*, 23 F. Supp. 1018, affirmed 106 F. (2d) 69..... 18
Dugan v. *Sharkey*, 89 App. Div. 161..... 34
Dunbar v. *Boston, etc., R. Corp.*, 181 Mass. 383..... 48
Dunlop v. *Dunlop*, 172 Misc. 66..... xiii
Dykman v. *Kenney*, 154 N. Y. 483.....viii, ix; xi, xii

Ellenwood v. *Marietta*, 158 U. S. 105..... 14
Elmendorf v. *Taylor*, 10 Wheat. 152..... 24
Erie R. Co. v. *Tompkins*, 304 U. S. 64, 11, 12, 13, 14, 15, 16, 17, 18, 21, 22, 23, 25, 26, 50, 58
Everitt v. *Everitt*, 41 Barb. 385..... iii, iv

Flash v. *Conn*, 109 U. S. 371..... 56
Florida Power & Light Co. v. *City of Miami*, 98 F. (2d) 180; certiorari denied, 305 U. S. 644..... 18
Fontain v. *Ravenel*, 17 How. 369..... 13
Ford v. *Clendennin*, 215 N. Y. 10..... 33
Fourth National Bank v. *Francklyn*, 120 U. S. 747..... 57

Godden v. *Kimmell*, 99 U. S. 201..... 24
Godfrey v. *Terry*, 97 U. S. 171..... 55, 56
Goldberg v. *Berry*, 231 App. Div. 165..... x
Golden v. *Cervenka*, 278 Ill. 409..... 31
Gordon v. *Washington*, 295 U. S. 30..... 11

PAGE

Guaranty Trust Company v. *United States*, 304 U. S. 126 49
Guffey v. *Smith*, 237 U. S. 101 ..... 11, 26

Hale v. *Allinson*, 188 U. S. 56 10
Hanna v. *Peoples National Bank*, 179 N. Y. 107, affirming 35 Misc. 517 35
Hanover Fire Insurance Co. v. *Morse Dry Dock & Repair Co.*, 270 N. Y. 86 ..... 23, 33, xii
Heine v. *Degen*, 262 Ill. 357 31
Heiner v. *Mellon*, 304 U. S. 271 18
Hinderlider v. *La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92 ..... 16, 18
Hirshfeld v. *Fitzgerald*, 157 N. Y. 166 ..... 42, 46, 51
Hollingsworth v. *General Petroleum Corp.*, 26 F. Supp. 917 18
Holmberg v. *Anchell*, 24 F. Supp. 594 ..... 8, 23
Holmberg v. *Beaumont*, 28 F. Supp. 100 8
Holmberg v. *Hannaford*, 28 F. Supp. 216 8
Hovenden v. *Lord Annesly*, 2 Sch. & Lef. 607 24
Hoyt v. *Tuthill*, 33 Hun 196 ..... 23, 33, vi, viii, x
Hubbell v. *Sibley*, 50 N. Y. 468 33
Hughes v. *Reed*, 46 F. (2d) 435 24
Hun v. *Cary*, 82 N. Y. 65 ..... vi, vii, viii, x, xi

Jones v. *Mutual Fidelity Co.*, 123 Fed. 506 23
Johnson v. *White*, 39 F. (2d) 793 27

Kellogg Co. v. *National Biscuit Co.*, 305 U. S. 111 15
Kelly v. *Potter*, 16 N. Y. Supp. 446 34
Kernochan v. *U. S.*, 29 F. Supp. 860 18
Kirby v. *Lake Shore etc. Railroad*, 120 U. S. 130 ..... 24, 27

Lang v. *Lutz*, 180 N. Y. 254 54
Lightfoot v. *Davis*, 198 N. Y. 261 21
Lyeth v. *Hoey*, 305 U. S. 188 18
Lyon v. *Mutual Ben. Health & Accident Assn.*, 306 U. S. 484, Rehearing Denied 306 U. S. 667 15

PAGE

Mandeville v. *Riddle*, 1 Cranch. 290 12
Mann v. *Fairchild*, 14 Barb. 548 33
Marshall v. *Sherman*, 148 N. Y. 9 42
Mason v. *Henry*, 152 N. Y. 529 ..... viii, ix, xi, xii
Mason v. *U. S.*, 260 U. S. 545 ..... 14, 44
Matthews v. *Rogers*, 294 U. S. 521 11
MacEwen v. *City of New Rochelle*, 149 Misc. 251 34
McCarty v. *Gault*, 24 F. Supp. 977 18
McCormack v. *Halstead*, 132 Misc. 916 34
McKenzie v. *Wappler Electric Co.*, 128 Misc. 827 34
McDonald v. *Thompson*, 184 U. S. 71 ..... 53, 54
In re Menahan's Executors, 224 App. Div. 139 34
Mencher v. *Richards*, 256 App. Div. 280 ..... 35, 36, 37, 38, xiii
Menendez v. *Holt*, 128 U. S. 514 49
Metropolitan National Bank v. *St. Louis Dispatch Co.*, 149 U. S. 436 24
Michaelson v. *U. S.*, 266 U. S. 42 11
Michigan Ins. Bank v. *Eldred*, 130 U. S. 693 21
Michoud v. *Girod*, 4 How. 503 24
Mississippi Mills v. *Cohn*, 150 U. S. 202 ..... 11, 26
Moreschi v. *Mosteller*, 28 F. Supp. 613 15
Morgan v. *Hamlet*, 113 U. S. 449 54

Nettles v. *Childs*, 281 N. Y. mem. 60 45

O'Brien v. *Fitzgerald*, 143 N. Y. 377 ..... viii, ix, xi, xii

Partridge, et al. (*Martin, et al., Interveners*) v. *Ainley, et al.*, 28 F. Supp. 742 8
Payne v. *Hook*, 7 Wall. 425 11
Pearson v. *McGraw*, 84 L. Ed. 139 18
Pearsall v. *Smith*, 149 U. S. 231 58
Pennsylvania v. *Wheeling etc. Bridge Co.*, 18 How. 460 13
Pitcher v. *Sutton*, 238 App. Div. 291 34
Platt v. *Wilmot*, 193 U. S. 602 53
Pollard v. *Bailey*, 20 Wall. 520 8
Potter v. *Walker*, 276 N. Y. 15, 252 App. Div. 244, 33, 34, 38, 39, 40, 46, 47, 52, x, xi, xii

PAGE

Pufahl v. *Estate of Parks*, 299 U. S. 217 ..... 14, 53, 54
Pusey & Jones Co. v. *Hanssen*, 261 U. S. 491 25

Rankin v. *Fidelity Trust Co.*, 189 U. S. 242 ..... 45, 54
Reisman v. *Hall*, 257 App. Div. 892 ..... 30, 31, 45
Richards v. *Gill*, 138 App. Div. 75 ..... 35, 36
Richmond v. *Irons*, 121 U. S. 27 ..... 8, 9
Riddle v. *Mandeville*, 5 Cranch. 322 12
Robinson v. *Campbell*, 3 Wheat. 212 ..... 11, 12, 13
Matter of Rogers, 153 N. Y. 316 34
Ruhlin v. *New York Life Insurance Co.*, 304 U. S. 202 ..... 11, 13, 14, 16, 17, 18, 22, 23, 26, 49, 50, 58
Rundle v. *Allison*, 34 N. Y. 180 ..... 23, 33, vi, viii, x

Scott v. *Neely*, 140 U. S. 106 26
Schram v. *Cotton*, 281 N. Y. 499 45
Schram v. *Poole*, 97 F. (2d) 566 14
Seligson, et al. v. *Weiss, et al.*, 222 App. Div. 634 44
Shelby v. *Guy*, 11 Wheat. 361 12
Smith v. *Kansas City Title & Trust Co.*, 255 U. S. 180 17
Smyth v. *Ames*, 169 U. S. 466 29
Southern Pacific v. *Bogert*, 244 Fed. 61, 250 U. S. 483 27, 28
Sprague v. *Ticonic National Bank*, 83 Law Ed. 771 13
Stearns v. *Page*, 7 How. 819 24
Stevens, et al. v. *Grand Central Mining Co., et al.*, 133 F. 28 ..... 24, 27
Stoll v. *Gottlieb*, 305 U. S. 165, Rehearing Denied 305 U. S. 675 18
Stratton v. *St. Louis Southwestern Ry. Co.*, 284 U. S. 530 29
Swift v. *Tyson*, 16 Pet. 1 ..... 12, 14, 15, 25, 50, 53

Terry v. *Little*, 101 U. S. 216 ..... 8, 9
Texarkana v. *Arkansas Louisiana Gas Co.*, 306 U. S. 188 15
Treadwell v. *Clark*, 190 N. Y. 51 ..... 33, 34

U. S. v. *Howland*, 4 Wheat. 108 ..... 11, 12, 13
United States v. *Oregon Lumber Co.*, 260 U. S. 290 49

Van Hook v. *Whitlock*, 3 Paige Ch. 409 ..... 50, 51

PAGE

Wallace v. *Lincoln Savings Bank*, 89 Tenn. 630..... 52, xii
Wayman v. *Southard*, 10 Wheat. 1..... 12
Weeks v. *Love*, 50 N. Y. 568..... 50
Wheeler v. *Greene*, 280 U. S. 49.....4, 5, 7, 10, 28, 40, 52, xiii
Wichita Royalty Co. v. *City National Bank*, 306 U. S. 103; 95 F. (2d) 671..... 15
Willard v. *Wood*, 164 U. S. 502..... 49
Wilson v. *Koontz*, 7 Cranch. 202..... 58
Wright v. *Russell*, 269 N. Y. 683.....30, 31, 45

OTHER AUTHORITIES.

13 Fletcher Cyc. Private Corp., 923-3, Sec. 6508..... 31
Pomeroy Equity Jurisprudence (4th Ed.), Section 138 23
"Substance" and "Procedure" in the Conflict of Laws, 42 Yale L. J. 333..... 25
Charles Warren, "New Light on the History of the Federal Judiciary Act of 1789", 37 H. L. R..... 13, 14

STATUTES.

Illinois Constitution of 1870, Article XI, Section 6.... 31
New York Laws of 1788, Chapter 43..... 32, i
New York Laws of 1830, Part III, Chapter 4, Title 2, Article 6, Sections 50 and 52 (Revised Statutes), 33, i, ii, iii
New York Laws of 1830, Part III, Chapter 4, Title 2, Article 6, Section 49 (Revised Statutes)..... i
New York Laws of 1848, Part II, Title 2, Chapter 3, Section 77 (Field Code of Procedure of 1848)..... 33, ii
New York Laws of 1849, Part II, Title 2, Chapter 3, Section 97 (Field Code of Procedure of 1849)..33, ii, iii, iv
New York Code of Civil Procedure (Throop Code), Sections 382 vii
388 iv

PAGE

New York Code of Civil Procedure, Section 394..... 35, 36
New York Laws of 1876, Chapter 448, Section 448..... 41
New York Laws of 1877, Chapter 416, Section 394..... 41, vii
New York Laws of 1892, Chapter 688, Section 54..... 54
New York Laws of 1892, Chapter 689, Section 52..... 41
New York Laws of 1901, Chapter 354, Section 5..... 54
3 Revised Statutes of New York, 3rd Edition, pp. 843, *et seq*..... ii
New York Banking Law (formerly Sections 80 and 113a, now Section 632)..... 9
New York Civil Practice Act, Section 4..... 34
New York Civil Practice Act, Section 7(8)..... 34
New York Civil Practice Act, Section 8..... 34
New York Civil Practice Act, Section 48..... xv
New York Civil Practice Act, Section 49..... 44
New York Civil Practice Act, Section 49, subd. 4, 3, 10, 29, 32, 33, 34, 35, 36, 39, xiii, xvi
New York Civil Practice Act, Section 50..... 44
New York Civil Practice Act, Section 51..... 44
New York Civil Practice Act, Section 48, subds. 1, 3, 5..... 34
New York Civil Practice Act, Section 52..... 44
New York Civil Practice Act, Section 53, 3, 31, 32, 33, 40, 44, 48, iv, v, vii, xvi
New York Civil Practice Act, Section 195, 29, 41, 49, 51, xvii
South Carolina Code, Sections 7853, subds. 1 and 6..... 45
South Carolina Code, Section 7868..... 45
South Carolina Constitution, Article 9, Section 18..... 45
United States Constitution, Article 3, Section II, Clause 1..... 12, 22
United States Judiciary Act of 1789, Section 16..... 13
United States Judiciary Act of 1789, Chapter 21, Section 2..... 22
United States Judiciary Act of 1789, Section 34..... 14

PAGE

United States Laws of 1916, Chapter 245 (Federal Farm Loan Act) 2, 3
12 U. S. C. A., Section 191 9
12 U. S. C. A., Section 192 9
12 U. S. C. A., Section 812 ..... 3, 6, 10, 17, 30, 41, xiii, xiv
28 U. S. C. A., Section 394 (Equitable Jurisdiction) ..13, xiv
28 U. S. C. A., Section 41 (1a) 17
28 U. S. C. A., Section 723 (Practice in Equity), 16, 21, 22, 57, xv
28 U. S. C. A., Section 724 (Conformity Act) xv
28 U. S. C. A., Section 725 (Rules of Decision Act), 13, 14, xv

IN THE

Supreme Court of the United States

OCTOBER TERM 1939.

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS, and JOHN P. WING, co-partners doing business under the firm name of RUSSELL, MILLER AND CAREY, and SAMUEL A. PLEASANTS,

Petitioners,

against

JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, co-partners doing business under the firm name of J. S. TODD & Co., on behalf of themselves and all other creditors of THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO,

Respondents,

and

HOWARD Y. LISSENDEN, HENRY TRUXTON EMERSON, WILLARD C. WEISS and ALEX LOWENTHAL, as Members of The Ohio Joint Stock Land Bank of Cincinnatti, Ohio, Creditors' Protective Committee,

Intervenors-Respondents.

No. 329

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS AND INTERVENORS-RESPONDENTS.

Opinions Below.

The opinions of the United States District Court for the Southern District of New York on the motion to strike out the defense of limitations (R. 33-38; R. 338-49) and on final decree (R. 357-364) are reported respectively in 1 F. Supp. 788, and 20 F. Supp. 930 and 936. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 420-435) is reported in 104 F.(2d) 169.

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Second Circuit was entered May 29, 1939 (R. 435). The petition for a writ of certiorari was filed on August 29, 1939, and was granted on October 16, 1939, U. S. (R. 437). The jurisdiction of this Court rests upon Judicial Code Section 240(a) as amended by the Act of February 13, 1925, 28 United States Code Sec. 347.

The order of this Court granting certiorari limits the review to the question of the application of the New York statute of limitations (R. 437).

Questions Presented.

Respondents, bondholders of a Federal Joint Stock Land Bank organized under the Federal Farm Loan Act (Chapter 245 of the Laws of 1916), brought suit in equity against petitioners, shareholders in that bank, to recover

the liability imposed upon shareholders of such banks by 12 U. S. C. A. Section 812.

The questions presented are:

1. Is a Federal equity Court in determining the liability created by a Federal statute held by this Court to be cognizable only in equity governed by a state statute of limitations?

2. Assuming the state statute to be controlling, is the New York three year statute of limitations, Civil Practice Act, Section 49, Subdivision 4, or the New York ten year equitable statute of limitations, Civil Practice Act, Section 53, applicable?

Statutes Involved.

Because of the number of statutes involved, they have been set forth in Point A-3 of the Appendix.

Statement.

This is a representative action in equity by J. S. Todd & Company on behalf of themselves and other creditors of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, against petitioners brought pursuant to 12 U. S. C. A. Section 812. The statute in question is part of the Federal Farm Loan Act (ch. 245 Laws of 1916).

The petitioners Russell, Miller, Steers and Wing, copartners in the brokerage firm of Russell, Miller & Carey held 200 shares of the land bank stock in their firm name in a customer's account (R. 152). The Court below properly refused to find that these petitioners were not beneficial owners (R. 376, Proposed Finding 21) since it appeared that the account had a credit of $6,000.00 when the stock was received (Exhibit "BB-1", R. 337, admitted R. 153) and there was no proof that the account was

a margin account. Petitioner Pleasants was a pledgee of the stock in question and transferred it into his own name (R. 151), having made a loan to the prior record stockholder (R. 149), a company of which he was a director (R. 147).

At the time suit was instituted in December of 1931 (R. 365) the respondents did not know the extent of the bank's insolvency (R. 370, Finding 24, R. 116-117) and an accounting was, therefore, necessary and requested (R. 6 and 7).

The District Court found that the plaintiffs below and the "creditors and bondholders on whose behalf plaintiffs sue" had notice of the accrual of said cause of action on or about April 15th, 1928 (R. 354). From April 16th, 1928 to April 12th, 1929, these petitioners were repeatedly apprised of their liability (Plaintiffs' Exhibit "3", R. 162-4, admitted R. 109, Plaintiffs' Exhibit "5", R. 166, admitted R. 109). All of these demands were admittedly received by the respective defendants below (R. 108, 109, Finding of Fact 5, R. 350).

On April 2nd, 1928, Greene, the then statutory receiver believing respondents' cause of action vested in him instituted a suit against stockholders of the bank to collect their statutory liability. On December 13th, 1928 (29 F. (2d) 468) the Circuit Court of Appeals for the Seventh Circuit upheld the receiver's right to bring the action and that decision remained the law until December 2nd, 1929, when this Court denied a motion for reargument of its decision in *Wheeler* v. *Greene*, 280 U. S. 49 (Plaintiffs' Exhibit "12", R. 187, admitted R. 113). During this period creditors were of course barred from proceeding. During the pendency of the receiver's action and in April

of 1929, Mains, a statutory receiver of the bank, began actions against the petitioner Pleasants, but on the advice of the counsel of the Farm Loan Board, action was withheld against the petitioners Russell, Miller and Carey awaiting the decision of this Court in *Wheeler* v. *Greene* (R. 351).

Following the decision of this Court in the *Wheeler* case and after the organization of a Creditors Protective Committee an action was brought by and on behalf of creditors in the District Court in Ohio in February of 1930 (R. 351-352) and on March 4th, 1931, at the behest of the Creditors Protective Committee an action was brought in the Federal Court in New York against all of the petitioners (R. 352) which was discontinued on December 2nd, 1931, only because the position of the plaintiff in that action as a creditor entitled to bring a representative action in equity had been questioned (R. 82).

Immediately thereafter, and on December 16th, 1931, the present action was brought against all of the petitioners (R. 1). It is, therefore, apparent that the Creditors Committee having begun an action on March 4th, 1931, did bring an action within three years from the date of the accrual of the cause of action. On this state of facts both the District Court and the Circuit Court held that the plaintiffs below had been diligent in the pursuit of their rights (R. 347, 429) and there had been no untoward delay or laches (R. 353, 429).

Decisions of the District Court.

(R. 33-38, 1 F. Supp. 788; R. 338-349, 20 F. Supp. 930; R. 357-364, 20 F. Supp. 936.)

The plaintiffs moved before Patterson, D. J., to strike from the answer the defense of the statute of limitations. The Court treated the defense as a defense of laches and held that on the pleadings as they then were, the plea of laches was good (R. 34) because more than the legal period had elapsed and no excuse for delay was pleaded at that time (*cf.* R., pp. 3-7 and R. 41-43). The Court held that under the New York law the three year, rather than the six year legal statute, would apply, if any legal statute were applicable (R. 34-35).

The issue of limitations and laches was tried specially before Knox, D. J. He found on the facts that the plaintiffs had not been guilty of laches (R. 353), a finding not open to dispute by reason of this Court's limitation of the writ granted by it.

On the trial of the main issue Mandelbaum, D. J. held that the defendants were shareholders and, therefore, liable under 12 U. S. C. A., Section 812, and directed judgment accordingly (R. 357-364).

Decision of the Circuit Court of Appeals.

(R. 420-435, 104 F. (2d) 169.)

The Circuit Court upheld the decision of Knox, D. J., as to the absence of laches and the decision of Mandelbaum, D. J., that the defendants were liable as shareholders. On the question here for review, the Circuit Court stated the question to be whether

> "The suit is barred by local statutes of limitations which would have been a bar had the action been at law instead of in equity." (R. 421.)

The Court, after stating that the three year statute would be applicable if the action were at law, said (R. 424):

> "Even where there is concurrent jurisdiction, however, and an action at law would be barred, in New York a suit in equity is not, as resort to equity is necessary to obtain complete and adequate relief."

and on the same page, it said, there is

> "no concurrent jurisdiction at law since creditors of a joint stock land can enforce the statutory liability of shareholders only in an adversary suit in equity • • •."

Clarke, Circuit Judge, dissented.[1]

POINT I.

The statute in question is solely cognizable in equity.

> "The only means of enforcing the liability left creditors of a Joint Stock Land Bank as the Court pointed out in the *Wheeler* case is an adversary suit in equity against the stockholders wherever they may be found."

Christopher v. *Brusselback,* 302 U. S. 500, at 502;

Wheeler v. *Greene,* 280 U. S. 49;

[1] The action was in equity, but the defendant pleaded the legal statute, and the possible relevance of the ten year equitable statute was not argued or considered in the Courts below.

Brusselback v. *Cago Corporation*, 85 F. (2d) 20 (Second Circuit) certiorari denied 299 U. S. 586;

Holmberg v. *Anchell*, 24 F. Supp. 594 (U. S. D. C., S. D. N. Y.);

Holmberg v. *Hannaford*, 28 F. Supp. 216, 218-19;

Holmberg v. *Beaumont*, 28 F. Supp. 100;

Partridge, et al. (*Martin, et al., Interveners*) v. *Ainley, et al.*, 28 F. Supp. 472, 475.

In the case at bar we are dealing with a particular type of statute and this Court has uniformly held not merely in cases involving Joint Stock Land Banks, but in all cases involving statutes similar to the one here involved, that the cause of action is solely cognizable in equity.

Terry v. *Little*, 101 U. S. 216;

Richmond v. *Irons*, 121 U. S. 27;

Pollard v. *Bailey*, 20 Wall. 520;

Alsop v. *Conway*, 188 Fed. 568 cert. den. 223 U. S. 720.

"There will always be difficulty in attempting to reconcile cases of this class in which the general question of remedy has arisen unless special attention be given to the precise language of the statute under consideration * * *. As the object is to provide a fund out of which the creditors are to be paid share and share alike it needs no argument to show that one creditor should not be permitted to appropriate to himself without regard to the rights of others that which is to make up the fund. * * * The provision is in legal effect for a propor-

> tionate liability by all stockholders * * *. So, too, it is clear that the obligation is one that may be enforced by the creditors; but as it is to be for all creditors it must be enforced by or for all. The form of action, therefore, should be one adapted to the protection of all. A suit at law by one creditor to recover for himself alone is entirely inconsistent with any idea of distribution."

Terry v. *Little,* 101 U. S. 216, at pp. 217-218.

The claims involved in the *Terry* case, *supra,* were based on a provision of the charter of a South Carolina bank (set forth at page 216), which was held by this Court to require a proportionate or "equal and ratable liability" similar to the express mandate contained in the statute here involved.

In the *Richmond* case, *supra,* at page 48, this Court said:

> "as all the shareholders are bound in that way" (equally and ratably) "to all the creditors any proceeding to enforce this liability must be such as from its nature would enable the Court to ascertain for what the stockholders ought to be made liable, to whom and in what proportion as respects each other. This can only be done by the methods and machinery of a court of equity."

The statute controlling the rights of the respondents herein is in no wise similar to a statute which vests the power irrevocably to fix the assessment in an individual, as in the case of National Banks where it is vested in the comptroller of the currency (12 U. S. C. A., Sections 191-192), or under the Laws of the State of New York, where it is vested in the Superintendent of Banks (New York Banking Law, formerly Section 80, now Section 632 and Section 113a), or to a statute which permits the Court to

fix the assessment binding upon all stockholders wherever domiciled.[2]

Unless the law under which a corporation is organized provides for the fixing of the stockholders' liability in absentia, which is here not permissible (*Christopher* case, *supra*), or unless the assessment may be fixed by an individual in whom the cause of action is vested, which is also not permissible in this case (*Wheeler* case, *supra*), or unless the statute does not require liability to be imposed "equally and ratably" (which 12 U. S. C. A., Section 812, does require), the jurisdiction of equity is exclusive because equity alone can afford a remedy and the creditor is not permitted to bring an action at law.[3]

From what has been said it necessarily follows that the citation of cases decided under other types of statutes, such as those cited by petitioners in their brief, are necessarily inapposite.

---

[2] An instance of this last class of cases, and the distinction in the nature of the Court's jurisdiction from the class of statute in the case at bar is nicely illustrated by the Minnesota statute and the extended litigation interpreting it. As originally drawn the statute was interpreted by this Court as having no extraterritorial effect. *Hale* v. *Allinson*, 188 U. S. 56. Following this decision the statute was amended and as so amended, this Court interpreted the statute as vesting the cause of action in the receiver whose action in the home jurisdiction of the bank was binding on all stockholders wherever domiciled, and even though not parties to the action. *Bernheimer* v. *Converse*, 206 U. S. 516.

[3] The authorities cited at page 9 of petitioners' brief all deal with liability under the National Banking Act and are, therefore, inapposite. We will hereinafter show that the petitioners are in error in stating that the Court of Appeals of New York has applied New York Civil Practice Act §49-4, or any other legal statute of limitations to any action where equity alone was capable of affording adequate relief.

POINT II.

Federal equity jurisdiction has always been and still is uniform throughout the Federal Courts of the United States and is unaffected by state statute or decision.[4]

There can be no successful denial of the proposition that Federal equity jurisdiction and the application of equitable remedies prior to the decision in the *Erie* and *Ruhlin* cases were uniform throughout the Federal Courts of the United States, and except as hereinafter noted (pp. 13, 14 this brief), unaffected by state statute or decision.[5]

The petitioners, at pages 17 to 23 of their brief, urge that the independence from state decision of general Federal equity jurisprudence is analogous to the independence of the Federal Courts from state decisions of general common law enunciated in *Swift* v. *Tyson*, 16 Pet. 1. From this premise they argue that "the theory of general Federal equity jurisprudence must fall" (Petitioners' brief p. 23) with the overthrow of the *Swift* v. *Tyson* doctrine. The argument is demonstrably unsound.

---

[4] Petitioners argue that the decisions of this Court in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, and *Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202, have affected the Federal equity jurisdiction so as to make it subject to State decision and statute (Petitioners' Brief, pp. 19-22).

[5] *Robinson* v. *Campbell*, 3 Wheat. 212, 221-3 (1818); *Boyle* v. *Zacharie*, 6 Pet. 648, 657-658 (1832); *Payne* v. *Hook*, 7 Wall. 425, 430 (1869); *U. S.* v. *Howland*, 4 Wheat. 108, 115 (1819); *Mississippi Mills* v. *Cohn*, 150 U. S. 202 (1893); *Guffey* v. *Smith*, 237 U. S. 101, 114 (1915); *Burrill* v. *Locomobile Co.*, 258 U. S. 34, 38 (1922); *Michaelson* v. *U. S.* 266 U. S. 42, 63-65 (1924); *Matthews* v. *Rogers*, 284 U. S. 521 (1932); *Gordon* v. *Washington*, 295 U. S. 30 (1935).

Prior to this Court's decision in *Swift* v. *Tyson, supra,* the rule of this Court was the rule re-enunciated by this Court in *Erie* v. *Tompkins, supra.*

Mandeville v. *Riddle,* 1 Cranch. 290 (1803) a note case;
Riddle v. *Mandeville,* 5 Cranch. 322, 329 (1809) note case;
Shelby v. *Guy,* 11 Wheat. 361 (1826) detinue for for a slave;
Wayman v. *Southard,* 10 Wheat. 1, 11-13 (1825) General Statement.

From 1789 to 1842 the doctrine of *Erie* v. *Tompkins* was the law and state decisions on questions of general common law were held to be binding on Federal law courts. During this same period of 53 years this Court repeatedly upheld the doctrine that Federal equity jurisdiction is independent and unaffected by state statute or decision.

Robinson v. *Campbell,* 3 Wheat. 212, 221-3 (1818);
U. S. v. *Howland,* 4 Wheat. 108, 115 (1819);
Boyle v. *Zacharie,* 6 Pet. 648, 657-658 (1832).

Surely this is conclusive proof that the doctrine with respect to the independence from state decision of Federal Courts of law laid down in *Swift* v. *Tyson* and overthrown in *Erie* v. *Tompkins,* has no relation whatsoever to the independence from state statute and decision of equity jurisdiction in Federal Courts of equity.

It hardly seems necessary to direct this Court's attention to the constitutional sanction for its equitable jurisdiction.[6] The jurisdiction thus conferred has always been

[6] United States Constitution, Article III, Section 2, Clause 1.

regarded by this Court as being the jurisdiction of the English Court of Chancery as it existed in 1789 subject to alteration only by Act of Congress or rule of Court.[7]

That Federal equity jurisdiction is as independent of State legislation or decision subsequent to this Court's decision in the *Erie* and *Ruhlin* cases as it was before is a proposition equally irrefutable.

Atlas Life Insurance Co. v. *Southern*, 83 Law Ed. 755; Decided April 17, 1939;
Sprague v. *Ticonic National Bank*, 83 Law Ed. 771; Decided April 24, 1939.

A.

Federal courts of equity will apply state law only where there is involved an issue which is local, or where a question of general common law arises in an equitable cause.

Although the statement is frequently made that the Federal equity jurisdiction is unaffected by state statute or decision, it has long been the rule that if the issue is local the Rule of Decisions Act[8] applied at law not only to statutes but also "to rights and titles to things having a permanent locality, such as the rights and titles to real estate and other matters immovable and intraterritorial in their nature

---

[7] *Warren, History of the Federal Judiciary Act of 1789*, 37 H. L. R. at pages 96-100. The article traces the development of Section 16 of the original Judiciary Act dealing with equity jurisdiction (now 28 U. S. C. A. 384 substantially unchanged). *U. S.* v. *Howland*, 4 Wheat. 108; *Fontain* v. *Ravenel*, 17 How. 369; *Pennsylvania* v. *Wheeling Etc. Bridge Co.*, 18 How. 460; *Robinson* v. *Campbell*, 3 Wheat. 212, etc.

[8] 28 U. S. C. A., Section 725.

and character" *Swift* v. *Tyson*.[9] The same doctrine has for long been applied to causes in equity as well as to actions at law.[10]

Since the decision of this Court in *Erie* v. *Tompkins*, 304 U. S. 64, and, more particularly, *Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202, Federal equity Courts, the jurisdiction of which is based on diversity of citizenship, are necessarily bound by State decisions on questions of general common law, e. g. the proper interpretation of a contract or the proper measure of duty owed a pedestrian on a railroad right of way, etc. This is so because the Federal Court has jurisdiction only because of the identity of the parties. The rights being adjudicated are created by State statute or decision and the law of the State is paramount.

B.

The doctrine of the *Erie* and *Ruhlin* cases is applicable only where the Federal jurisdiction is based on diversity of citizenship. Where, as here, Federal jurisdiction is based upon an Act of Congress adopted within its constitutional power, the doctrine of those cases has no application.

Section 34 of the Judiciary Act of 1789[11] sought to prescribe Rules of Decision only for cases in which the Federal Courts had jurisdiction because of diversity of citizenship. As Mr. Justice Brandeis said in the *Erie* case, *supra:*

> "• • • The purpose of the section was merely to make certain that in all matters except those in which some Federal law is controlling the Federal courts exercising jurisdiction in diversity of citizen-

[9] 16 Pet. at page 18.

[10] *Ellenwood* v. *Marietta*, 158 U. S. 105; *Mason* v. *U. S.*, 260 U. S. 545; *Pufahl* v. *Estate of Parks*, 299 U. S. 217; *Schram* v. *Poole*, 97 F. (2d) 566.

[11] 28 U. S. C. A. 725.

> ship cases would apply as their rules of decision the law of the State, unwritten as well as written."[12]

Swift v. *Tyson, supra*, was, of course, also a case in which the Federal jurisdiction was based on diversity of citizenship. At no time has it been understood that the original rule of *Swift* v. *Tyson* or the corrective rule of *Erie* v. *Tompkins* applied to cases other than those in which Federal jurisdiction is based on diversity of citizenship or to those issues or controversies of which a Federal Court would not have jurisdiction except for diversity of citizenship, but which are in the Federal Court because they are ancillary to, though independent of, a case in which Federal jurisdiction is founded on some other ground.[13] So far as counsel have been able to ascertain, this Court has only applied the rule of the *Erie* case to such cases.[14]

Mr. Justice Brandeis, writing for this Court, made this clear in announcing the new rule in the *Erie* case, saying:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." (Erie case, *supra*, at p. 78).

His statement:

"There is no Federal general common law" (p. 78) is not to be construed to mean that there is not any independent decisional law of the Federal Courts because

---

[12] See *Charles Warren "New Light on the History of the Federal Judiciary Act of 1789"*, 37 H. L. R. at page 49.

[13] *Wichita Royalty Co.* v. *City Nat'l Bank*, 306 U. S. 103, and see same case 95 F. (2d) 671 at 674 and 675.

[14] *Kellogg Co.* v. *National Biscuit Co.*, 305 U. S. 111, Note 1, page 113; *Lyon* v. *Mutual Ben. Health & Accident Assn.*, 305 U. S. 484, *Rehearing Denied* 306 U. S. 667; *Wichita Royalty Co.* v. *City National Bank*, 306 U. S. 103; *Texarkana* v. *Arkansas Louisiana Gas Co.*, 306 U. S. 188; *City Service Oil Co.* v. *Dunlap*, U. S. , 84 L. Ed. 185, decided December 4, 1939, *Moreschi* v. *Mosteller*, 28 F. Supp. 613.

on the same day that this Court handed down its opinion in the *Erie* case, the Justice writing that opinion upheld the existence of Federal common law where the jurisdiction of the Court was based upon an interstate compact which gave rise to independent Federal jurisdiction.[15]

We believe we have demonstrated that in applying equitable remedies the Federal equity jurisdiction is uniform and unaffected by state statute or decision. We believe we have also shown that this rule is unaffected by the *Erie* and *Ruhlin* cases. If this Court now makes the doctrine of those cases applicable to equitable remedies in the Federal Courts, as the petitioners urge it to, it will have effected an astounding change in, if not the complete destruction of, the jurisdiction of the Federal Courts of equity.

To extend the doctrine of the *Erie* and *Ruhlin* cases and, as the petitioners urge, make binding upon Federal equity, state statutes of limitations, would be to extend that doctrine (which, in the *Erie* and *Ruhlin* case was limited to substantive law) to procedural law and would result in holding unconstitutional 28 U. S. C. A. 723 which, for over 150 years, has prescribed that the "modes, of proceeding in suits of equity * * * shall be according to the principles, rules and usages which belong to Courts of equity". Such an extension of the doctrine of the *Erie* and *Ruhlin* cases would mean that the decisions in numberless cases in this and lower Federal Courts had, for over 150 years, exhibited flagrant error.

Finally, it is very questionable, in view of the nature of the equitable jurisdiction granted by the Constitution, whether this Court, though admittedly having the power,

---

[15] *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92, 110.

has the right to overthrow an independent jurisdiction so long recognized.

Even assuming that this Court is ready to take so drastic a step, that step would not be determinative of the issue here involved.

The constitutionality of the Farm Loan Act, of which Section 812 is a part, was upheld as a valid exercise of the constitutional power granted "by virtue of Article I, Section 8, Clause 18 of the Constitution granting to Congress the right to make all laws necessary and proper to make the grant effectual" (255 U. S. 208). The grant being the grant of power to Congress

> " to levy and collect taxes, to borrow money, to regulate commerce, to pay the public debts, to declare and continue war, to raise and support armies and to provide and maintain a navy, etc."

The Court on the same page also said:

> "While the express power to create a bank or incorporate one is not found in the Constitution, the Court * * * found authority so to do in the broad general powers conferred by the Constitution upon the Congress."
>
> *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180, 208.

The jurisdiction of the District Court in the case at bar is not based on diversity of citizenship. The District Court had jurisdiction because the suit involved the proper interpretation of a Federal law and more than $3,000.00 was at stake (28 U. S. C. A. Section 41(1a)).

> *Brusselback* v. *Chicago Joint Stock Land Bank*, 85 F.(2d) 617, *certiorari denied*, 299 U. S. 615.

The doctrine of the *Erie* and the *Ruhlin* cases by explicit statement of this Court has no application to a case

arising under an Act of Congress. To transpose the language of Mr. Justice Brandeis in 304 U. S. at p. 78:

> "There is no Federal general common law * * * except in matters governed by * * * Acts of Congress. * * *"

That this transposition accurately states the meaning of the learned Justice is obvious from the fact that on the same day that the *Erie* case was decided the Court, speaking through Mr. Justice Brandeis upheld the existence of Federal common law.[16]

A Federal question is involved whenever the decision of the case necessarily involves the interpretation and application of the United States Constitution or an Act of Congress and in such situations the state law is inapplicable. The accuracy of this statement is entirely unaffected by the decisions of this Court in the *Erie* and *Ruhlin* cases.[17]

---

[16] Note 15, *supra*.

[17] The following cases are all cases subsequent to the decision of this Court in *Erie* v. *Tompkins* and *Ruhlin* v. *New York Life Insurance Co.*:

(a) Cases in this Court: Constitution—Impairment of contracts: *Florida Power & Light Co.* v. *City of Miami*, 98 F. (2d) 180; *certiorari denied*, 305 U. S. 644; *Pearson* v. *McGraw*, 84 L. Ed. 139, decided December 4, 1939; Bankruptcy Act: *Stoll* v. *Gottlieb*, 305 U. S. 165, 170, *Rehearing denied* 305 U. S. 675; Federal Income Tax: *Lyeth* v. *Hoey*, 305 U. S. 188, 194; *Heiner* v. *Mellon*, 304 U. S. 271, 279. (b) Cases in lower Federal Courts: National Banking Act: *Bradford* v. *Chase National Bank of City of New York*, 24 F. Supp. 28, 30; *Downey* v. *City of Yonkers*, 23 F. Supp. 1018, 1023, *affirmed* 106 F. (2d) 69; *McCarty* v. *Gault*, 24 F. Supp. 977, 979; Constitution: *Hollingsworth* v. *General Petroleum Corp.*, 26 F. Supp. 917; Federal Estate Tax: *Kernochan* v. *U. S.*, 29 F. Supp. 860.

The decisions in the *Erie* and the *Ruhlin* cases require Federal Courts to apply State decisional law on questions of "general common law" where Federal jurisdiction is based on diversity of citizenship. The decisions go no further.

The rationale of those cases, however, may have broader significance. If so, we submit that the limit of the rationale of those cases is to require the application of State law, whether statute or decision and whether matter of substance or procedure, in all cases where the jurisdiction of the Federal Court depends on diversity of citizenship, i. e., the identity of the parties (*cf. Fourth National Bank* v. *Francklyn*, 120 U. S. 747, 756). Such a doctrine would, of course, trench upon the absolute independence of the Federal equity jurisdiction and would represent a step never before taken by this Court. Even so, the possible rationale suggested would require the affirmance of the decision reached below. In the case at bar the liability is created not by State law (*Fourth National Bank* case, *supra*, at p. 756), but by Act of Congress. The cause of action thus created is exclusively cognizable in equity (Point "I" this brief). As this Court said in the *Fourth National Bank* case, *supra*, at page 756 "where the provision for the liability is coupled with the provision for a special remedy" (here a remedy cognizable only in equity) "that remedy and that alone must be employed."

We have shown that the exclusive remedy is an action solely cognizable in equity. The limitation of that remedy is laches, not a State statute of limitations. The liability, having been created by Federal law which provides its own exclusive remedy, the limits of the remedy are to be

found in the Federal law and its doctrine of laches constitutes the prescribed limitation. To apply a State statute of limitations in such a situation in a Federal Court of Equity would be a complete perversion of the limits of the rationale in the *Erie* and *Ruhlin* cases.

That the legal statute will be applied in Federal stockholder liability cases cognizable at law points the limits of the rationale suggested. In such cases the Federal Courts in applying State statute are applying their own law of conflicts and not State law, because Congress has provided (28 U. S. C. A., Sections 724, 725) that where it has not acted,[17a] the Federal practice in actions at law shall conform to the State practice "as near as may be" and the State statute will be applied.

[17a] *Arnson* v. *Murphy*, 109 U. S. 238.

C.

If a Federal District Court in equity interpreting and applying a Federal statute is bound by the New York law of legal limitations, the result will be either to judicially legislate 28 U. S. C. A. 723 out of existence, or arrive at the conclusion that such actions can be brought at any time.

The petitioners, recognizing the truth of the statement contained in the caption, in order to avoid the dilemma in which they are placed by the adjudicated cases have attempted to argue, at pages 17 and 18 of their brief that the New York legal statute of limitations involves a substantive, not a procedural question, though they concede that the New York Court of Appeals has decided to the contrary.[18]

It is appropriate to point out that in their brief in support of their petition for certiorari in this case petitioners affirmatively asserted that legal "limitation is a procedural matter not embraced within the rule of the Tompkins case".[19] With respect to questions involving rights *in personam* like that in the case at bar, the decisions of this Court[20] as well as the New York Court of Appeals are in complete accord with petitioners' earlier view.

Assuming, therefore, that the doctrine of legal limitations is procedural, and assuming, arguendo, that petitioners' contention that the Federal doctrine of laches is a question of substantive law and that the doctrine has been

---

[18] *Lightfoot* v. *Davis*, 198 N. Y. 261, 264, cited at page 17 petitioners' brief.

[19] Page 17 Petitioners' Brief in support of Petition for a Writ of Certiorari.

[20] *Campbell* v. *Holt*, 115 U. S. 620; *Davis* v. *Mills*, 194 U. S. 451; *Michigan Ins. Bank* v. *Eldred*, 130 U. S. 693.

abolished in New York (Petitioners' Brief, pp. 18-22), we arrive at amazing alternatives.

First: It must follow, unless 28 U. S. C. A. 723 is now to be held unconstitutional by this Court, that a Federal Court sitting in equity is not bound by a state rule of procedure since that section which finds its source in the first Judiciary Act (Act of 1789, Chapter 21, Section 2) specifically requires the District Court to adopt "the principles, rules and usages which belong to Courts of equity" thus prohibiting the application of a legal statute of limitations and requiring the application of the equitable doctrine of laches.

Second: If the petitioners' argument is correct and laches is substantive and the decision in the *Erie* and *Ruhlin* cases are here applicable, those cases prohibit the District Court from applying the substantive doctrine of laches as developed in the Federal Courts and require it to apply the State law on the subject. According to petitioners, however, there is no law of laches in New York. The only possible conclusions to be drawn if the petitioners' argument is sound is either (a) that the Act of Congress adopted in 1789 pursuant to constitutional grant of power (28 U. S. C. A. 723, Constitution Article III, Section 2, Clause 1) is unconstitutional, or (b) that actions in equity in Federal Courts sitting in the State of New York can never be barred because, assuming the validity of 28 U. S. C. A. 723, the procedural state law of limitations is inapplicable to a Federal Court in equity and the Federal equitable doctrine of laches has been abolished in favor of state law by the *Erie* and *Ruhlin* cases. This *reductio ad absurdum* demonstrates

the fallacy of the petitioners' attempt to apply the doctrine of the *Erie* and *Ruhlin* cases to a situation to which they never were intended to apply.

POINT III.

Laches is a remedial doctrine exclusively equitable and unknown to the law. Where there is no legal remedy laches alone applies. Where there is adequate legal remedy (the concurrent equitable jurisdiction) federal courts of equity apply laches by analogy to state statutes of limitations.

Before briefly discussing the relevant authorities which are almost unanimous, counsel desire to direct the Court's attention to the difficulty that has resulted from the inexact use of the phrase "concurrent jurisdiction". It is frequently, though it is submitted incorrectly, used to describe those *rights* which are cognizable both on the law and equity side of the Court. This incorrect use of language is discovered only where equity alone grants remedy, although the right sued on in equity is also recognized at law.[21]

It is submitted that the "concurrent jurisdiction" is present only where the suitor has available adequate optional remedies. The distinction here made has received high judicial sanction.[22]

---

[21] The doctrine of specific performance is universally recognized as exclusively equitable although, of course, the law would permit action for breach of the contract which equity is requested specifically to enforce. Similarly, the doctrine of rescission is exclusively equitable though the rights of the defrauded party would also be recognized at law.

[22] *Hanover Fire Insurance Co.* v. *Morse Dry Dock & Repair Co.*, 270 N. Y. 86, 89; *Rundle* v. *Allison*, 34 N. Y. 180; *Hoyt* v. *Tuthill*, 33 Hun 196; *Pomeroy Equity Jurisprudence* (4th Ed.) Section 138; *Holmberg* v. *Anchell*, 24 F. Supp. 594; *Jones* v. *Mutual Fidelity Co.*, 123 Fed. 506, 522.

In speaking of the suitor in the preceding paragraph we include not merely the plaintiff named in the action but the party on whose behalf the action is brought. To illustrate: If a stockholder or receiver brings an action, it would be within the "concurrent jurisdiction" of equity if the corporation on whose behalf the suit is brought had an adequate legal remedy.[23]

Where, as we have here defined it, there is concurrent jurisdiction, *i.e.*, optional remedies at law and in equity, it is the fact that by analogy the Court of Chancery always has, and will, follow the legal statute of limitations, and where the legal remedy is barred, will bar the equitable.[24]

Where there are optional remedies at law and in equity Federal Courts of equity have always applied the legal limitation.[25]

In causes exclusively equitable for which there is no legal remedy, such as the case at bar, not only is the period of legal limitations not binding, but there is no analogy to follow.[26]

Appellant strongly urges that the freedom of Chancery jurisdiction from State statutes of limitations is analogous

---

[23] See discussion at A-2 in Appendix, pp. v. to xiii.

[24] Such a case is *Elmendorf* v. *Taylor*, 10 Wheat. 152, 173, citing and relying upon *Hovenden* v. *Lord Annesly*, 2 Sch. & Lef. 607. In that case the legal action of ejectment had been barred by lapse of time and this Court, per Marshall, C. J., held that the right to equitable relief by bill to redeem was also barred by analogy.

[25] *Michoud* v. *Girod*, 4 How. 503; *Baker* v. *Cummings*, 169 U. S. 189; *Metropolitan National Bank* v. *St. Louis Dispatch Co.*, 149 U. S. 436; *Godden* v. *Kimmell*, 99 U. S. 201; *Hughes* v. *Reed*, 46 F. (2d) 435; *Stearns* v. *Page*, 7 How. 819.

[26] *Kirby* v. *Lake Shore etc. Railroad*, 120 U. S. 130; *Stevens* v. *Grand Central Mining Co.*, 133 Fed. 28 (C. C. A. 8th); *Badger* v. *Badger*, 2 Wall 87, 94-5.

to the independence of Federal Courts on questions of general common law first enunciated in *Swift* v. *Tyson*, *supra*, and must therefore fall with the reversal of the doctrine enunciated in that case (Petitioners' brief, pp. 20-22).

We submit that the attempted analogy is completely illusory. We are frank to admit that diligent research has failed to bring to light any authority indicating whether the doctrine of laches in equity is a matter of substance or procedure, and Petitioners' brief exhibits equal lack of success on their part. Without attempting to determine the appropriate answer to this question, if there be one, since the answer is necessarily largely a question of nomenclature,[27] it cannot be successfully disputed that the equitable doctrine of laches is necessarily a doctrine of remedy and not one affirmatively creating a substantive right. This Court, speaking through the same Justice who wrote the opinion in the *Erie* case, concluded that State statutes dealing with substantive rights will be given effect in Federal equity while those dealing with remedial rights need not be.

Pusey & Jones Co. v. *Hanssen*, 261 U. S. 491.

That case involved the right of a Federal equity court to appoint a receiver for an insolvent corporation on the application of a simple contract creditor. The right existed under a State statute of the jurisdiction in which the Federal court of equity was sitting. This Court held that the State statute provided a new remedy and could not affect the proceedings of the Federal equity court, and the appointment of a receiver under such a statute was

[27] "Substance" and "Procedure" in the Conflict of Laws, 42 Yale L. J. 333.

beyond the equity jurisdiction of the Federal Court. This Court said at page 499:

> "* * * the power [of appointing a receiver upon the application of a simple contract creditor] enables the Chancellor to afford a remedy which theretofore would not have been open to an unsecured simple contract creditor. But because that which the statute confers is merely a remedy, the statute cannot affect proceedings in the Federal Courts sitting in equity."[28]

Assuming *arguendo,* as petitioners affirmatively state, that the doctrine of laches has been abolished by statute in the State of New York, the abolition of that doctrine by legislative act and the substitution therefor of a statute of equitable limitations must necessarily affect matters of remedy. It cannot be said to create a new substantive equitable right. As the *Erie* and *Ruhlin* cases deal only with the applicability of State "general common law" doctrines to Federal Courts sitting both in law and equity, the attempted application of the doctrine of those cases to a doctrine of Federal equitable remedy necessarily breaks down.

Until now the truth of the statement appearing just above has never been successfully questioned. It has always been the rule in Federal equity Courts, not merely with respect to its general equitable remedial powers, but specifically with respect to the remedial doctrine of laches, that State statutes of limitations will be applied by the Federal Courts by analogy only where the jurisdiction is concurrent, as we have here defined concurrent, that is, where there is

---

[28] Federal Equitable remedies may not be enlarged by State Statute, *Scott* v. *Neely,* 140 U. S. 106; *Cates* v. *Allen,* 149 U. S. 451; nor may they be narrowed, *Miss. Mills* v. *Cohn,* 150 U. S. 202; *Guffey* v. *Smith,* 237 U. S. 101, 114.

no adequate remedy at law. Where the cause is exclusively equitable for want of a legal remedy, there is no analogy to follow.

Kirby v. *Lakeshore, etc. Railroad*, 120 U. S. 130;
Benedict v. *City of New York*, 250 U. S. 321;
Southern Pacific v. *Bogert*, 250 U. S. 483; 244 Fed. 61;
Johnson v. *White*, 39 F. (2d) 793;
Stevens, et al. v. *Grand Central Mining Co., et al.*, 133 F. 28 (C. C. A. Eighth Circuit) per Van Devanter, J.[29]

Petitioners admitted that this Court in the *Kirby* case, *supra*, extended the period within which a suit in equity might be brought beyond that stipulated in the analogous legal limitation statute. They say, however, "it is believed that in no other case than the case of *Kirby* v. *Lake Shore etc. Railroad* has the doctrine been actually applied by this Court that equity is not bound by the state statute of limitations". We find difficulty in understanding the quoted sentence in view of the decision of this Court in *Southern Pacific* v. *Bogert*, 250 U. S. 483. In that case an action to impress a trust on majority stock was begun between 22 years according to the majority of the Court and 25 years according to the minority, after the cause of action was known by the plaintiffs to have accrued. No statute of limitations was pleaded and the Circuit Court apparently held the cause to be solely cognizable in equity and for that reason alone did not bar the suit (per Hough, C. J., 244

[29] It was unsuccessfully argued in the *Stevens* case that the state statute there involved was by its terms "applicable to suits in equity" (p. 32) and, therefore, applicable in a Federal equity suit. The argument was correctly rejected. See pp. 21 to 26 this brief.

Fed. 61 at 65) though it arose in New York which had a ten year equitable statute. In spite of the great lapse of time relief was granted and Mr. Justice Brandeis pointed out that not even "failure long continued to discover the appropriate remedy, though well known, establish laches where there has been due diligence and * * * the defendant was not prejudiced by the delay".

It is not amiss here to point out that the case at bar is very similar in this respect to the *Bogert* case except that in the case at bar the correct remedy was not known at all until after this Court had decided the *Wheeler* case in 1929 and that action was brought well within the statutory period after the correct remedy was ascertained.[30]

POINT IV.

If the cause of action here sued upon, interpreted as it has been in this court, was sued upon in the courts of the State of New York, that state would apply the ten-year statute, and if the law in that state is here applicable, this Court will apply the same statute.

Before fully discussing the New York law of limitations, it is necessary to correct certain errors into which the Petitioners have fallen. At pages 23-27 of their brief, Petitioners urge that the respondent's claim is primarily a claim at law, and to support this argument they urge that the judgment sought is a fixed sum of money and that under

---

[30] Reargument was denied in *Wheeler* v. *Greene, supra,* on December 2nd, 1929. This suit was begun on December 16th, 1931, less than two years after the appropriate remedy was discovered by this Court and in the meantime, action, though improper, had been brought against one of the defendants here involved in April of 1929 (R. 351) and all of the defendants were repeatedly apprised of their liability (R. 162-4, R. 166, R. 108-109).

New York Civil Practice Act Sec. 195, a representative action might be brought at law.

In answer to the first of these arguments, it is only necessary to direct this Court's attention to pages 30 to 40 of this brief, where we have set forth the decisions of this Court holding that though the payment of money is the ultimate aim of the suit, it is none the less solely cognizable in equity. The complete answer to Petitioners' second argument above set forth is that generally it has been uniformly held by this Court that a State statute creating a method of proceeding at law in a cause theretofore equitable could not deprive this Court of its equity jurisdiction,[31] and specifically that the existence of New York Civil Practice Act Sec. 195, did not in a case identical with the case at bar provide a legal remedy. *Cago* v. *Brusselback*, 85 F. (2d) 20, certiorari denied 299 U. S. 586. In the *Cago* case, *supra*, the petitioners in this Court based their major argument on the proposition that the legal remedy afforded by New York Civil Practice Act, Sec. 195, was adequate and that there was therefore a failure of Federal equity jurisdiction.[32] In view of the argument of Petitioners in the case at bar to the effect that this action is not solely cognizable in equity because it developed during the trial, though it was unknown at the time the bill was filed (R. 370), that the assessment would be for 100%, and that "therefore an action to recover this liability clearly lay at law" (Petitioners' Memorandum, pp. 23-24), it is a complete answer to direct this Court's attention to the fact that exactly

---

[31] *Barber* v. *Barber*, 21 How. 582, 592; *Smyth* v. *Ames*, 169 U. S. 466; *Stratton* v. *St. Louis Southwestern Ry. Co.*, 284 U. S. 530.

[32] See pages 9 to 12, Petitioners' brief in support of writ of certiorari. Pages 1 to 3 Reply brief.

that argument was stressed in the *Cago* case, *supra*, wherein the bill, unlike the bill in the case at bar, affirmatively alleged the necessity of assessing a 100% stockholders' liability.[33] In spite of that fact, strongly urged upon this Court by the Petitioners in their brief in support of their petition for certiorari, the petition was denied. As this Court by its action obviously held in the *Cago* case that the presence of a 100% liability did not prevent that action from being solely cognizable in equity, because no legal remedy was there afforded, a repetition of the argument in the case at bar should have no greater effect.

Petitioners state that the New York Court of Appeals has applied its three-year statute "in actions of the character here involved" to actions in equity and at law. We confidently assert (a) that no action has ever been brought in New York on a statute similar to the one in the case at bar interpreted as it has been by this Court; and (b) that Petitioners are in error in implying that the cases of *Wright* v. *Russell*, 269 N. Y. 683, and *Reisman* v. *Hall*, 257 App. Div. 892, are similar to the case at bar. As to the first proposition urged by the Petitioners, we have already shown (pp. 7-10 of this brief) that as interpreted by this Court, the rights of the creditors are exclusively cognizable in equity. There is no reported decision in New York interpreting the statute here in question (28 U. S. C. A., Sec. 812), and if there were, for reasons already indicated, any interpretation of this Federal statute which the

---

[33] See also *Alsop* v. *Conway*, 188 Fed. 568 cert. den. 223 U. S. 720 where the Circuit Court states that a 100% stockholders assessment was necessary.

New York Courts might have made could have no effect binding on the Federal Courts. Inspection of the records and briefs on appeal in the *Wright* and *Reisman* cases, *supra*, demonstrate that they were actions brought pursuant to the Constitution of that state as representative actions to recover the liability of stockholders of Illinois banks.

Counsel never urged the applicability of the ten-year equitable statute on the ground that the cause of action was solely cognizable in equity. Counsel did there urge that the New York ten-year statute[34] was applicable on the ground that the liability was a "constitutional" liability and therefore was not a liability created "by the common law or by statute" (N. Y. C. P. A. Sec. 53),[35] and was not governed by New York Civil Practice Act Sec. 49, subd. 4, the three-year statute. It was not open to counsel to urge that the ten year equitable statute applied on the ground that the action was solely cognizable in equity because the Illinois Constitution did not provide for an "equal and ratable" liability, as does the statute in the case at bar, and the highest Illinois Courts had held that an action at law would lie under the liability statute there in question,[36] a fact which barred the argument to counsel in that case that the cause was cognizable only in equity, which it admittedly was not.

Throughout their brief, Petitioners urge that the three year statute[37] is applicable because by its specific terms it

---

[34] N. Y. C. P. A. Sec. 53.

[35] See the opinion of the Court at Special Term in *Wright* v. *Russell*, 155 Misc. 877.

[36] Illinois Const. of 1870, Art. XI, Sec. 6, contains no "equal and ratable" requirement. *Heine* v. *Degen*, 262 Ill. 357; *Golden* v. *Cervenka*, 278 Ill. 409; holding that action at law permissible but will be enjoined at behest of plaintiff in representative suit in Equity. 13 Fletcher Cyc. Private Corp., 932-3, §6508.

[37] N. Y. C. P. A. Sec. 49, subd. 4.

includes a liability similar to the one in the case at bar, and by its terms applies to actions solely cognizable in equity, as well as to actions at law (Petitioners' brief, pp. 8, 9, 10, 11, 13, 19, 20). This argument, unsupported by citation of authority, is demonstrably unsound. It is unfortunate but true that the demonstration requires a somewhat lengthy recital because it involves a knowledge of the history of limitations in the State of New York.

A.

Irrespective of the "specific" nature of the New York Statute of Limitations, in New York all causes solely cognizable in equity and all causes where an inadequate remedy exists at law are, and always have been governed by New York Civil Practice Act Sec. 53, the ten-year statute.

The legislative history, together with relevant notes of revisers, is set forth in full in the appendix to this brief. From this legislative history the following is apparent:

Prior to passage of Chapter 43 of the Laws of 1788 of the State of New York there was no limitation statute. That first act contained no limitation with respect to bills in equity. The first comprehensive statute of limitations was adopted in 1830. As may be seen by referring to the appendix, it provided that if the jurisdiction of law and equity were concurrent, the legal statute applied, but it also provided that in so far as the application to remedies exclusively equitable was concerned, the legal limitations specified were not to apply, but that such actions

> "shall be filed within ten years after the cause thereof shall accrue and not thereafter."

(Part III, Chapter 4, Title 2, Article 6, Sec. 52, Laws of 1830.)

In 1848 and 1849 these sections were re-enacted except that Secs. 50 and 52 were simplified and became Sec. 97 of the 1849 Code. That there was no change in substance is apparent from the revisers' note, which is deemed to be sufficiently important to be here set forth. They said:

> "This section" (Sec. 77 of the Code of 1848, Sec. 97 of the Code of 1849) "is a substitute for the article of the Revised Statutes * * * and provides for all the cases heretofore known as suits in equity * * *. The periods of limitation are the same as those now existing, the only difference being that by the present statute they are applied to the form, while by the proposed section, they are made to depend upon the substance of the *remedy*." (Italics ours).

Sec. 97 of the 1849 Code is substantially identical with Sec. 53 of the New York Civil Practice Act.

Since New York has had an equitable statute of limitations, it has been held to apply not only to all causes where the right was solely equitable but to causes where though a legal right existed the remedy at law was inadequate.

Rundle v. *Allison*, 34 N. Y. 180;
Hoyt v. *Tuthill*, 33 Hun 196;
Mann v. *Fairchild*, 14 Barb. 548;
Hubbell v. *Sibley*, 50 N. Y. 468;
Treadwell v. *Clark*, 190 N. Y. 51;
Ford v. *Clendennin*, 215 N. Y. 10;
Hanover Fire Insurance Co. v. *Morse Dry Dock & Repair Co.*, 270 N. Y. 86;
Potter v. *Walker*, 276 N. Y. 15.

The Courts of this State have always held the shorter or legal statutes of limitations inapplicable to equitable causes of action in spite of the fact that a literal reading of the language of those statutes would include equitable as well as legal causes of action.[38]

The Courts have applied this reasoning to Civil Practice Act, Section 49, Subdivision 4, which Section the peti-

---

[38] New York Civil Practice Act, Section 48, Subdivisions 1, 3 and 5, read as follows:

"1. The following actions must be commenced within six years after the cause of action has accrued: (1) An action upon a contract obligation or liability, express or implied, except a judgment or sealed instrument."

"3. An action to recover damages for an injury to property or a personal injury except in a case where a different period is expressly prescribed in this Article." (Amended in September 1936. Amendment not applicable to cases hereinafter cited.)

"5. An action to procure a judgment on the ground of fraud. The cause in such an action is not deemed to have accrued until the discovery by the plaintiff or the person under whom he claims of the facts constituting the fraud." (Amended in 1939. Amendment not applicable to cases hereinafter cited.)

The term "action' is defined by the Civil Practice Act to include legal and equitable actions (New York Civil Practice Act, Sections 4, 7-(8), 8).

Action within the literal terms of Section 48, Subdivision 1, but 10 year statute held applicable: *McCormack* v. *Halstead*, 132 Misc. 916; *Kelly* v. *Potter*, 16 N. Y. Supp. 446 (not reported elsewhere); *Matter of Crowley*, 167 Misc. 840; *Clarke* v. *Gilmore*, 149 App. Div. 445.

Action within the literal terms of Section 48, Subdivision 3, but 10 year statute held applicable: *MacEwen* v. *City of New Rochelle*, 149 Misc. 251; *Potter* v. *Walker*, 276 N. Y. 15; *Chance* v. *Guaranty Trust Co.*, 251 App. Div. 855.

Action within the literal terms of Section 48, Subdivision 5, but 10 year statute held applicable: *Treadwell* v. *Clark*, 190 N. Y. 51; *Chorrmann* v. *Bachmann*, 119 App. Div. 146; *Pitcher* v. *Sutton*, 238 App. Div. 291; *McKenzie* v. *Wappler Electric Co.*, 128 Misc. 827; *In re Menahan's Executors*, 224 App. Div. 139; *Matter of Rogers*, 153 N. Y. 316; *Dugan* v. *Sharkey*, 89 App. Div. 161.

tioners claim to be applicable to the equitable action in the case at bar.

Hanna v. *Peoples National Bank*, 179 N. Y. 107, *affirming* 35 Misc. 517;
Richards v. *Gill*, 138 App. Div. 75;
Mencher v. *Richards*, 256 App. Div. 280.

In the *Hanna* case, *supra*, the plaintiff Hanna sued directors of the defendant bank to require them to account for the loss resulting from certain acts of misfeasance which had occurred more than six years prior to the institution of the action. Hanna had sold his stock prior to the institution of the action, but before trial another stockholder who still owned stock in the defendant bank intervened in the action as an additional party plaintiff. The defendant directors set up the three year statute of limitations contained in Code of Civil Procedure, Section 394 (now Civil Practice Act, Section 49, Subdivision 4 without change). The Court construed the action as an equitable one and held (35 Misc. 523) that Code of Civil Procedure, Section 394, the prototype of Civil Practice Act, Section 49, Subdivision 4, had no application and that the case was governed by the ten year equitable period of limitations. In so holding, the Court below stated in 35 Misc. at page 523:

> "The statute of limitations applicable is not three years but ten years and that plea of the defendants is ineffectual."

This decision of the lower Court was affirmed by the Court of Appeals as to Piser, who still owned his stock.

In the case of *Richards v. Gill, supra,* the action was against a stockholder's devisee. The law of New York is that in such a case relief may be had against the devisee only in equity. It was, therefore, held in that case that in spite of the fact that the action was originally based upon a stockholder liability falling within the literal terms of Code of Civil Procedure Section 394 (now Civil Practice Act Section 49, Subdivision 4), equity alone could afford relief against the stockholder's devisee and the ten year statute therefore applied.

At pages 12 and 13 of their brief, petitioners undertake to distinguish the *Mencher* v. *Richards* case (*supra*) on the ground that Civil Practice Act, Section 49, Subdivision 4, provides a limitation with respect to "liabilities created by the common law or by statute" and that the liability in the *Mencher* case was "in equity". Irrespective of the soundness of this distinction, and it is respectfully submitted that it is unsound since the term "common law" as used in the statute would, without more include a liability imposed in equity, the New York Court did not decide the case on the ground stated by the petitioners, to wit, that the liability "was not a liability created by common law".

What the Appellate Division did decide in the *Mencher* case was that though a literal reading of Section 49, Subdivision 4, would include actions in equity as well as actions at law, this result would not follow because the ten year statute always applied to equitable actions, irrespective of the specific nature of the language of the statute which appeared to apply equally to actions at law and in equity. At pages 281 and 282, the Court said:

> "The contention of respondents to the contrary" (that the three year statute controlled the entire

cause of action) "is no more forceful than would be a claim to the effect that an action based upon injury to property, even though equitable in nature, would be governed by the statute in which such cause of action is specifically enumerated. The genesis and development of the ten year statute make it clear that it was uniformly designed to govern equitable actions, and that doctrine has been so strongly and uniformly enunciated that a departure therefrom would require an express enactment of the legislature, which is not to be found in the foregoing provisions relating to 'liability created by common law or by statute' * * *."

That petitioners' explanation of that case is erroneous becomes at once evident if the briefs before the Court in that case are examined.[39]

That case is, therefore, specific and reasoned authority for the proposition that even though a cause of action falls within the literal provisions of Civil Practice Act, Section 49, Subdivision 4, the three year statute will not apply if the only remedy is in equity or if the legal remedy is inade-

---

[39] The briefs before the Court in the *Mencher* case, *supra*, so clearly illustrate the significance of the language used by the Court and quoted above that they will here be commented upon at some length. Point I of the appellant's main brief, which occupies over 12 pages is captioned as follows:

"The statute of limitations set forth in Section 49, Subdivision 4, Civil Practice Act, bars all actions against directors of moneyed corporations, whether the relief sought therein be legal or equitable."

One of the subdivisions is captioned:

"It is erroneous to designate Section 53 of the Civil Practice Act as the 'equitable' statute of limitations."

The captions of the respondents' brief are as follows:

"Sections 49, Subdivision 4, of the Civil Practice Act does not govern equitable causes of action. All equitable causes of

quate. The rule stated by the Appellate Division in the *Mencher* case (*supra*) directly applies to Civil Practice Act §49 Subd. 4, a doctrine today universally recognized in New York. This we shall now demonstrate to be so.

Until the decision of *Potter* v. *Walker*, 276 N. Y. 15 (1937), there were two entirely distinct doctrines respecting the application of the ten year statute in those cases where equity alone afforded adequate relief. The first doctrine was to the effect that in all cases where the legal remedy is inadequate the ten year statute is applicable. This doctrine was affirmatively upheld in the *Potter* case, *supra*. That case involved a derivative action by stockholders against directors for malfeasance as to some and for negligence as to others. The Court of Appeals at pages 25 and 26 said:

> "In respect to those causes of action by which is sought to recover profits received by directors by reason of wrongful acts, an action at law would not

---

action are governed by the ten year period of limitations (Sec. 53, C. P. A.)."

The sub-points give first the history of Section 53 of the Civil Practice Act; second, the cases construing Section 53, third, the cases interpreting Section 49, Subdivision 4.

The appellant's reply brief contains the following captions:

"Point I: Section 53, Civil Practice Act, does not apply to all equitable actions.

"Point II: Plaintiff can procure full and adequate relief at law for the wrongs charged in the complaint."

In view of the very thorough discussion of the applicability of the three and ten year statutes to an action falling within the literal terms of Section 49, Subdivision 4, the language of the Court in that case quoted in the body of this brief has unmistakable significance and leads to but one possible conclusion, *i. e.*, that where equity alone can afford adequate relief, the ten year, not the three year, statute is applicable, even though the cause of action comes within the specific terms of the statute.

> afford adequate relief. * * * The Appellate Division is, therefore, clearly right in applying the ten year statute of limitations as to such causes of action."

The second doctrine was to the effect that a derivative action was necessarily always in equity[40] and that, therefore, the ten year statute always applied, even though the party on whose behalf the action was brought, i. e., the corporation had an adequate remedy at law. This doctrine was demolished by the *Potter* case, *supra*,[41] the Court saying at page 26:

> "Those causes of action, however, which are based merely upon negligence of two of the directors who are not alleged to have participated in the receipt of any wrongful profits at the expense of the corporation require the application of a different rule. * * * If the remedy were invoked directly by the corporation or a receiver a common law action for damages would lie. It would be adequate and consequently equitable relief would be unnecessary."[42]

---

[40] See history of this doctrine in Appendix, pages vi to x.

[41] That this is the effect, and it is submitted the only effect, of *Potter* v. *Walker* is beautifully illustrated by the case of *Chance* v. *Guaranty Trust Co.*, 164 Misc. 346, *affirmed* 251 App. Div. 855. At the time of these decisions, *Potter* v. *Walker* had not been decided and the Court held that the ten year statute was applicable because the action was derivative and the stockholder plaintiff had no adequate remedy at law After the decision in *Potter* v. *Walker*, the *Chance* case came up again (256 App. Div. 841) and the Appellate Division held that the six year statute was applicable since the derivative nature of the action did not justify the application of the longer statute because the corporation on whose behalf the action had been brought had an adequate remedy at law.

[42] To the same effect is the even later case of *Cwendinski* v. *Bent*, 256 App. Div. 612, affirmed by the Court of Appeals November 14th, 1939, which applied to a derivative action the test of adequacy of legal remedy to the party on whose behalf the action was brought, *i. e.*, the corporation. The Court in discussing the statute applicable

The history leading to the growth of this second doctrine overthrown by the *Potter* case is deemed to be of sufficient interest to be set forth in full in the appendix.

In an excess of caution we desire to point out to the Court that the action in the case at bar is a representative action not a derivative action. No one other than the creditors could ever have brought the action here involved.[43] While, as shown above, the statute applicable to a derivative action is the statute applicable to the party on whose behalf the suit is brought and the legal statute will be applied if that party's remedy at law is adequate, whereas the equitable statute will be applied if that party's remedy at law is inadequate, the only question here involved is, have the respondents in the case at bar an adequate legal remedy? If, as this Court has inferentially held in denying certiorari in the *Cago* case, *supra*,[44] the answer is in the negative, the New York Courts, assuming their statute of limitations to be applicable to the situation here present, would apply the ten year statute (Civil Practice Act, Section 53).

---

to the cause of action which was to recover excess bonuses said at page 615:

> "* * * the corporation could have instituted an action for money had and received and consequently no accounting would have been necessary. Had the corporation brought the action a six year statute of limitations would have controlled. A shareholder is in no better position than the corporation even though the complaint is addressed to the equity side of the Court."

---

[43] *Wheeler* v. *Greene*, 280 U. S. 49.

[44] *Cago* v. *Brusselback*, 299 U. S. 586.

B.

In New York a stockholder liability statute enforcible only by creditors in a representative action is necessarily exclusively equitable.

Under the New York Banking Law in effect until 1897 the stockholders' liability could only be enforced by creditors in a representative action.[45] Civil Practice Act Sections 195 and 49 Subd. 4 were part of the statute law of New York in 1897 having been adopted in 1876.[46]

If petitioners' argument (Pets. brief, p. 26) as to the adequacy of the legal remedy now alleged to be available under Civil Practice Act Section 195 is sound, it is obvious in view of the identical statutes in force prior to 1897, that the Court of Appeals of the State of New York would

---

[45] Laws 1892, Chapter 689 being Chapter 37 of the General Laws, Article 2, Section 52, constituting the Banking Law, which so far as material here reads as follows:

> "Except as prescribed in the Stock Corporation Law, the stockholders of every such corporation shall be individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such corporation to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares.'

The striking similarity between this statute and 28 U. S. C. A., Section 812, the statute involved in the case at bar, is at once apparent.

[46] Laws of 1876, Chapter 448, Section 448, the predecessor of C. P. A. 195 provides so far as material here:

> "and where the question is one of a common or general interest of many persons; or where the persons who might be made parties are very numerous and it may be impracticable to bring them all before the Court, one or more may sue or defend for the benefit of all."

C. P. A. §49 Subd. 4 was §394 of the Code of Civil Procedure adopted in its present form by Ch. 416 laws of 1877.

have held that a representative action by creditors against stockholders under an "equal and ratable" liability statute might be brought at law. They held exactly the contrary.

Hirshfeld v. *Fitzgerald*, 157 N. Y. 166;
Marshall v. *Sherman*, 148 N. Y. 9, 21-22, 23.

It necessarily follows that C. P. A. § 195 and its predecessor deal only with questions of joinder of parties. They do not transform an action in equity into one at law. They do not afford a legal remedy to a statute theretofore solely cognizable in equity. Petitioner's failure to cite a single case to show that they do is conclusive in view of the *Hirshfeld* case (*supra*).

POINT V.

Petitioners' Brief.

Petitioners' appeal, reduced to its simplest terms, urges this Court either (a) completely to alter its basic jurisdiction in equity, upheld since the adoption of the Constitution, by abolishing the doctrine of laches and renounce its prerogative of interpreting Federal questions according to its own views and adopt whatever may be the views of the various States in which the question arises, or (b) reverse its uninterrupted line of decisions that bank stockholder liability statutes enacted by Congress enforcible only by stockholders in a representative action under a statute requiring "equal and ratable" liability are solely cognizable in equity. We respectfully submited that no authority cited by petitioners supports either argument.

Before discussing petitioners' authorities, we deem it necessary to clarify certain issues.

At page 24 of their brief, petitioners arrive at conclusions which we believe to be unjustified by the record. They say:

> "It was conceded by the Circuit Court of Appeals (R. 423, 104 F. (2d) at 172) and will doubtless be conceded by the respondents here, that the New York statute of limitations would bar this action to the exclusion of laches if the jurisdiction of law and equity in this case is concurrent."

We will not concede the correctness of the statement just quoted, nor was its correctness conceded by the Circuit Court of Appeals. What the Circuit Court said with respect to "concurrent jurisdiction" was:

> "Even where there is concurrent jurisdiction, however, and an action at law would be barred, in New York a suit in equity is not if resort to equity is necessary to obtain complete and adequate relief" (R. 424).

In short, what the Circuit Court said and what we are willing to concede is that even if the jurisdiction is concurrent, which it is not in the case at bar, the New York statute would bar the action if, but only if, the remedy at law is adequate. We have shown in this brief that there was no remedy at law.

On page 24 of their brief, petitioners say:

> "Respondents convinced the Courts below that this action is one of exclusively equitable cognizance by reason of its representative character and the need for an accounting among the creditors."

This statement is wholly incomplete. We did urge the exclusive equitable nature of the action on the grounds mentioned, but chiefly we urged it on the ground that there was no adequate remedy at law, and that when the suit was brought an accounting from the debtors was necessary.

With respect to the New York law of limitations, we believe that laches has not been abolished. It will be applied, however, only to cut down and not to enlarge the appropriate limitation statute.[47] By the term "appropriate", we mean that actions at law will be barred by the appropriate Civil Practice Act, Sections 48 to 52, inclusive, and suits solely cognizable in equity, *i. e.*, where the legal remedy is absent or inadequate, will be barred by the ten year equitable statute, Civil Practice Act, Section 53. This disposes of the necessity of discussing authorities in Petitioners' Brief, Point I, subpoint B, pages 14 to 17.

To support their argument that the doctrine of laches should be abolished in the Federal Courts petitioners at page 9 of their brief cite eight authorities to the effect that in an action at law brought by a receiver of a bank, the legal statute of limitations applies. Argument is unnecessary to refute the applicability of these authorities, in view of the obvious adequacy of the legal remedy, and that fact is substantially admitted in Petitioners' note "4" on page 9, though they attempt to distinguish by citing *Mason* v. *U. S.*, 260 U. S. 545, to the effect that 28 U. S. C. A., Section 725, is merely a codification of pre-existing constitutional law. The Court in the *Mason* case, *supra*, was, however, careful to base its application of the State rule of damages on the fact that the action was local (p. 558) and in addition stated at that page that "the statute and decisions relied upon have nothing to do with the general principles of equity * * *." We hardly believe that petitioners will urge that the doctrine of laches has nothing to do with "general principles of equity".

---

[47] *Seligson, et al.* v. *Weiss, et al.*, 222 App. Div. 634 (1928), at 638.

The citation of New York authorities at pages 10 and 12-14,[48] for the proposition that the highest New York Court "has regularly applied the three-year statute in actions of the character here involved" (Petitioners' Brief, p. 10) is entirely warranted upon analysis of those decisions. We have at pp. 28-29 of this brief clearly shown the inapplicability of the *Wright* and *Reisman* decisions[49] relied on by petitioners.

The *Nettles* case,[50] *supra*, involved liability of stockholders of a South Carolina bank where the relevant statute did not create an "equal and ratable" liability and did vest the cause of action in a receiver.[51] The proceeding was in equity and sought to hold liable as stockholders of the bank persons not record stockholders. Such an action is, of course, maintainable at law[52] and the equitable jurisdiction was, therefore, truly concurrent; that is, the legal remedy was adequate.

The *Schram* case, *supra*,[53] is to the same effect. There

---

[48] *Wright* v. *Russell*, 269 N. Y. 683; *Reisman* v. *Hall*, 257 App. Div. 892; *Nettles* v. *Childs*, 281 N. Y. mem. 60 decided July 11, 1939; *Schram* v. *Cotton*, 281 N. Y. 499.

[49] See Note "48".

[50] See Note "48".

[51] Article 9, Section 18 of the Constitution of South Carolina and Section 7868 of the Code of that State, so far as here material, read as follows:

> "That stockholders in all such banks and banking institutions shall be liable to depositors therein in a sum equal in amount to their stock over and above the face value of the same."

The liability may be enforced only by a receiver. South Carolina Code, Section 7855, subdivisions 1 and 6. *Branchville Motor Co.* v. *Adden*, 158 S. C. 90; *Biltrite Building Co.* v. *Elliott*, 166 S. C. 534.

[52] *Rankin* v. *Fidelity Trust Co.*, 189 U. S. 242; *Anderson* v. *Abbott*, 23 F. Supp. 265, 268.

[53] See Note "48".

a receiver sued in equity to hold liable stockholders of a holding company who were not record stockholders of the insolvent bank. In that case of clear concurrent jurisdiction, the plaintiffs' receiver did not urge, as indeed he could not, that the action was solely cognizable in equity. He urged that the defendants were bound by contract not by force of the National Banking Act statute there involved and that, therefore, the six year legal statute applied. The Court of Appeals stated at page 507:

> "A voluntary promise to assume a duty or liability, which the law imposes even where there is no promise, creates no new duty or liability."

In short the statute imposed the obligation on the beneficial owner of the stock whom we have shown could be reached at law, and it was immaterial that the stockholder had made a promise in addition to the obligation imposed by statute. The three year statute, therefore, applied.

Though perhaps unnecessary, we again point out that where the stockholder liability in New York is granted by an "equal and ratable" statute enforcible only by the stockholders in a representative action, the jurisdiction of equity in New York is exclusive.

Hirshfeld v. *Fitzgerald*, 157 N. Y. 166.

At pages 12 and 13 of their brief, petitioners undertake to analyze the effect of *Potter* v. *Walker*, 276 N. Y. 15, and the cases since decided. We believe that we have conclusively demonstrated in Points A-1 and A-2 in the Appendix and at pages 36 to 38 this brief, that petitioners' analysis of these cases is unsound. We have here or else-

where in this brief analyzed each case relied on by petitioners except *Davis* v. *Cohn*, 256 App. Div. 905, cited at petitioners' brief, page 12. Analysis of that action is revealing. The appeal involved the "Third" to "Sixth" causes of action in a derivative action brought by stockholders against directors. The Third cause of action alleged overpayments to directors in the form of a bonus. The Fourth cause of action alleged receipt of corporate moneys by the directors without consideration. The Fifth was in substance a reallegation of the Third. The Sixth alleged a transfer of corporate assets to the directors. The Trial Court had held that all of the causes of action were equitable and the ten year statute applicable. The Appellate Division held that the Third, Fourth and Fifth causes of action were within the six year statute, a decision obviously arrived at because the corporation had a legal action in money had and received, and the legal remedy of the corporation was adequate (*Potter* v. *Walker*, 276 N. Y. 15). As to the Sixth cause of action, however, the Appellate Division held that the only adequate remedy was in equity and the ten year statute applicable.

It may not be amiss to point out that our contention as to the test of sole equitable cognizance was affirmatively asserted in the brief of the appellant who argued that the six year statute was applicable to all of the causes of action in question on the appeal. At page 28 of his brief, he said:

> "The rule is that the ten year statute applies to those cases where, if the corporation itself had brought the suit, affirmative action by a Court of equity would have been necessary to give the plaintiff the relief to which it was entitled; but if the corporation had itself brought suit and adequate relief might have been obtained in an action at law, the

> appropriate lesser statute of limitation applies to the stockholders derivative action."

We believe that this Court will agree that all of the authorities cited by petitioners clearly enunciate the doctrine that where there is no legal remedy, or the legal remedy is inadequate, the ten year equitable statute of limitations, Civil Practice Act, Section 53, alone applies, even though there is a specific legal statute applicable to the right.

At pages 17 to 19 petitioners apparently undertake to argue that a legal statute of limitations is a matter of substance rather than procedure. The first case cited by them in support of this proposition is *Dunbar* v. *Boston etc. R. Corp.*, 181 Mass. 383, decided by Mr. Justice Holmes and is conclusive against them. In that case the Legislature had enacted a short statute of limitations and after the period for the bringing of the action had run they enacted a new statute lifting the pre-existent bar, which act was claimed to be unconstitutional. The Massachusetts Supreme Court regarded the original statute as one of those unusual statutes affecting the right because it said, at page 384:

> "The limitation no doubt was intended to be co-extensive with the grant."

It, nonetheless, upheld the constitutionality of the act restoring the right. Surely this shows that with respect to personal property a statute of limitations does not abrogate the right, for otherwise the later statute lifting the earlier bar of the statute must have been unconstitutional.

Petitioners next cite the decision of this Court on December 4th, 1939, in *City Service Oil Co.* v. *Dunlap*, and at-

tempt to create an analogy between a legal statute of limitations and a question involving the party on whom rested the burden of proof as to the issue of *bona fides*. The attempted analogy is fictitious.[54]

Petitioners then cite two cases[55] to the effect that the statute of limitations is a meritorious defense, a proposition with which we entirely agree in cases where the statute is applicable. On pages 18 and 19, starting with *Menendez* v. *Holt*, 128 U. S. 514, and concluding with *Willard* v. *Wood*, 164 U. S. 502, petitioners cite seven cases standing for the propositions that mere lapse of time is not alone sufficient to constitute laches, and that a Court may bar relief on the ground of laches though not pleaded. These propositions are in support of petitioners' statement that laches "is certainly a matter of substantive law" (Petitioners' Brief, p. 18).

We submit that the argument is a *non sequitur*. All doctrines of limitation rest upon the theory of change of circumstances by lapse of time. At law the presumption that the circumstances have changed is conclusive. In equity it is not, and, therefore, equity will not bar relief

---

[54] While there are some cases holding burden of proof to be procedural merely, the weight of authority and a recent decision of this Court cited in the *City Service Oil Co.* case, *supra*, hold it to be substantive. *Central Vermont R. Co.* v. *White*, 238 U. S. 507. As *Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202, held that even in equity general questions of common law, *i. e.*, questions of substance in cases where the Federal jurisdiction was based on diversity of citizenship and did not involve the Constitution or Act of Congress, was to be governed by the law of the State, it is not surprising to find that doctrine followed by this Court in the *City Service Oil Co.* case. Furthermore, in that case the question involved title to real estate and was, therefore, local under *Mason* v. *U. S.*, 260 U. S. 545.

[55] *United States* v. *Oregon Lumber Co.*, 260 U. S. 290; *Guaranty Trust Company* v. *United States*, 304 U. S. 126.

merely by a showing of delay unless there is evidence of change of circumstances, but this, we submit, does not make the doctrine of laches a substantive doctrine (See pp. 23 to 24 this brief).

From pages 19 through 23 of their brief, petitioners argue that the *Tompkins* and *Ruhlin* cases, having overruled the *Swift* v. *Tyson* doctrine at law, they have also overruled the exclusive equitable remedial doctrine of laches. At pages 11 to 26 of this brief we have shown the complete lack of merit in the argument.

Petitioners' second point, pages 24 to 32 of their brief, is devoted to the proposition that the action at law is of concurrent equitable jurisdiction. At pages 24 and 25 they urge that as the relief is "determinable in a fixed sum of money, an action to recover this liability clearly lay at law". We mention without comment the decisions of this Court to the contrary cited in Point "I" of this brief. We deem it necessary, however, to point out that the two cases cited by petitioners for this proposition, *Weeks* v. *Love*, 50 N. Y. 568 and *Van Hook* v. *Whitlock*, 3 Paige Ch. 409, completely confound petitioners' argument. The *Weeks* case, *supra*, was an action by creditors against stockholders of a corporation under a statute which did not impose an "equal and ratable" liability and which, as interpreted by the Court, allowed each creditor to sue individually. At page 571, the Court of Appeals of New York said:

> "Construing the tenth section in connection with the twenty-fourth section, it is apparent that the declaration in the tenth section that the stockholders shall be liable to the creditors of the company *does not create a liability in favor of all creditors.* • • •
>
> "The right to bring suit against the stockholder is a several and distinct right in the creditors, de-

pending upon special circumstances" (that the creditors' debt became due within a year prior to the suit) "and not a right in the creditors generally.***

"It" (the statute there under discussion) "assumes a liability to suit for a debt as a single, complete cause of action, and not merely a liability in equity to be enforced in an equitable action."

The Court then says that an equitable action may be brought, but an action at law would lie. The *Van Hook* case, *supra,* is to the same effect.

Those cases perfectly illustrate the distinction we have made between the concurrent jurisdiction, that is, where the law affords adequate relief, and the exclusive equitable jurisdiction, *i.e.,* where equity alone affords an adequate remedy, a distinction clearly noted by those two cases and enforced in *Hirshfeld* v. *Fitzgerald,* 157 N. Y. 166, where no action at law could be brought, though the liability was determinable in a fixed sum of money.

At page 26 Petitioners urge that Civil Practice Act, Section 195 would have permitted the plaintiffs in the case at bar to have stated a representative claim at law. We have fully disposed of this argument at pages 39 and 40 of this brief. In support of their argument, however, the petitioners rely on a number of cases from New York and other jurisdictions having statutes similar to Civil Practice Act Section 195. Inspection will show that those cases merely hold that the statute permitting one to sue on behalf of many, where there are common questions involved, is applicable to a suit in equity and to a suit at law. None of them stand for the proposition that the statute converts a proceeding solely cognizable in equity into an action at law, or affords relief at law for a suit solely cognizable in equity. *Hirshfeld* case, *supra.*

Petitioners then comment on *Wheeler* v. *Greene*, 280 U. S. 49 and *Christopher* v. *Brusselback*, 302 U. S. 500, and strongly suggest (Petitioners' Brief, p. 27) that this Court did not intend to hold that the equity jurisdiction was exclusive, but merely matter of form. As we understand this argument, petitioners are urging that the relief claimed, being for money, the right is inherently legal, from which they conclude that the resort to equity is merely matter of form and makes the equitable jurisdiction concurrent. Assuming that we have correctly interpreted petitioners' argument, it might be sufficient answer to direct this Court's attention to *Cago* v. *Brusselback*, 85 F. (2d) 20, *certiorari denied*, 299 U. S. 586, wherein this Court rejected the argument now again advanced. In addition, however, we desire to point out that not only in this Court is an action such as the case at bar solely cognizable in equity, but that in the State of New York as well where there is no legal remedy, or the legal remedy is inadequate the same result follows (See Point IV B this brief). Petitioners in support of their argument cite *Wallace* v. *Lincoln Savings Bank*, 89 Tenn. 630, *Potter* v. *Walker*, 276 N. Y. 15 and cases following the *Potter* case decided in New York.

The distinction made in the *Potter* and *Wallace* cases, *supra*, between actions solely cognizable in equity and those belonging to the concurrent jurisdiction are entirely applicable to the case at bar. We demonstrate at Point "A-2" in the Appendix the correct analysis of the *Potter* case and those cases following that case since decided in New York. The *Wallace* case, *supra*, points our argument as well. That was a *derivative* action in a situation where the corporation in behalf of which the action was brought had an adequate remedy at law, the Court holding in the *Wallace*

case that if the corporate adequate legal remedy was barred, the stockholders' remedy being derivative was similarly barred. In the case at bar, the respondents' cause of action is not derivative and neither they nor anyone else ever had any remedy at law.

The case of *Platt* v. *Wilmot*, 193 U. S. 602, was an action brought by a receiver at law. *McDonald* v. *Thompson*, 184 U. S. 71 might have been brought at law (See Note 52, p. 42 this brief).

Pufahl v. *Estate of Parks*, 299 U. S. 217, was an action by the receiver of a National Bank to procure a judgment allowing a claim against the inventoried assets of an Illinois Estate under the jurisdiction of the Illinois Court after the expiration of the time fixed by State law for the filing and allowance of such claims. The Court at page 225 said that the demand could only be enforced in conformity with the law of the forum although the Federal Court had jurisdiction irrespective of citizenship, and that in such a proceeding the State statute of limitations would be applied, citing a number of cases also cited by petitioners herein in all of which, including the *Pufahl* case, *supra*, an action at law was available. In addition, as carefully pointed out by the Court, the recovery against a deceased stockholder is to be governed by the laws of the testator's domicile (p. 223) and this is so because, as stated in *Swift* v. *Tyson*, 16 Pet. 1, the matter is intra-territorial or, as Mr. Justice Roberts stated in the *Pufahl* case, at page 226,

> "One having a right to go into the Federal Court * * * cannot obtain a judgment or decree entitling him to interfere with the administration of the *res* by the Court having its possession."

Petitioners conclude this aspect of their argument by citing *Lang* v. *Lutz*, 180 N. Y. 254, which to us seems a peculiarly inappropriate case for petitioners to cite, since in that case the Court of Appeals of New York pointed out the change which had been effected in Chapter 688 of the Laws of 1892 §54 by Chapter 354 §5 of the Laws of 1901, the earlier statute which was applicable to the *Lang* case (*supra*) permitting a creditor to sue a stockholder at law and the later statute requiring the suit to be brought in equity, because the later statute required "equal and ratable" liability (p. 259) as does the statute in the case at bar.

Finally, at pages 29 to 32, petitioners argue that the equitable jurisdiction in the case at bar "is at most concurrent" and the legal statute of limitations should apply. We have elsewhere in this brief shown this to be untrue (pp. 7 to 10 and 21 to 26 this brief). In support of this last point petitioners cite a number of cases which will be briefly discussed. At page 29 they cite *Curtis* v. *Connly*, 257 U. S. 260, which was a bill in equity by a receiver of a National Bank against directors for improper payments and loans. It is perfectly obvious that the bank had an adequate remedy at law in an action for money had and received, prior to the running of the statute and the case was one of real concurrent jurisdiction. As we have already pointed out *McDonald* v. *Thompson*, 184 U. S. 71, also relied on by petitioners, gave the receiver a right to sue the beneficial though not the record stockholder at law (*Rankin* v. *Fidelity Trust Co.*, 189 U. S. 242).

Morgan v. *Hamlet*, 113 U. S. 449, is like *Pufahl* v. *Estate of Parks*, *supra*, hereinabove distinguished from the case at bar and was cited in the *Pufahl* case. The *res* there involved was under the jurisdiction of the State Court and the local statute applied.

Petitioners then urge (Petitioners' Brief, pp. 29-30) that in at least two instances this Court has applied legal statutes to suits in equity by bank creditors, citing *Godfrey* v. *Terry*, 97 U. S. 171 and *Carroll* v. *Green*, 92 U. S. 509.

Godfrey v. *Terry, supra*, gave to the creditor a direct right to sue at law.[56] A single creditor had sued under the statute in equity to recover his debt. There was no excuse for the delay in bringing the suit. In view of the nature of the statute involved, the creditor had an action at law. The jurisdiction was based on diversity of citizenship, if the lower Court had any jurisdiction, which this Court held it did not (pp. 174-175). There can be no doubt but that the statute, by its terms, created a direct liability to the creditor since he was "held bound individually". At page 176 the Court said:

> "If there is any reason why this suit should be sustained in chancery instead of a separate suit at law against each stockholder it is that the burden may be equalized and properly distributed as to the shareholders, and the benefits among the creditors."

It is submitted that inferentially, this is a statement that an action at law would lie.

Carroll v. *Green, supra*, involved a liability statute identical with that in the *Godfrey* case, *supra*.[57] The statute involved in that case was not an "equal and ratable" statute,

---

[56] So far as material, the statute there involved read as follows: "in case of the failure of the said bank each shareholder, co-partnership or body politic having a share or shares in the said bank at the time of such failure, or who shall have been interested therein at any time within twelve months previous to such failure shall be liable and held bound individually for any sum not exceeding twice the amount of his, her or their share or shares."

[72] See Note "56".

though it was interpreted to be by Mr. Justice Swayne. There was no excuse for the *laches* in that case. Whatever authority it may have had originally, it was seriously weakened by the *Godfrey* case, *supra*, which was decided only two years later and which failed to cite the *Carroll* case. The action in the *Carroll* case, having been brought by bill in equity, and the equitable jurisdiction not having been questioned, the Court's statement that the "remedy was necessarily in equity" was, of course, dictum, not followed by this Court,[58] not necessary to the decision in the case and not good law. Finally, and perhaps, most important, both the *Carroll* and the *Godfrey* cases, *supra*, are cases in the Federal Court only by virtue of diversity of citizenship, and involve the rights and the limitations upon those rights created and controlled by State statute. As this Court has said:

> "The individual liability of stockholders in a corporation for the payment of its debts is always a creature of statute. At common law it does not exist. The statute which creates it may also declare the purposes of its creation and provide for the manner of its enforcement. The liability and the remedy were created by the same statute. This being so, the remedy provided is exclusive of all others. A general liability created by statute without a remedy may be enforced by an appropriate common law action, but where the provision for the liability is coupled with the provision for a special remedy that remedy and that alone must be employed. 20 Wall. 526, 527.
>
> "Pursuant to these principles, this Court has repeatedly held * * * that suits either at law or in equity, in the Circuit Court, by creditors of a corporation, to enforce the liability of stockholders under a *State* statute are governed by the statute of limita-

[58] *Flash* v. *Conn*, 109 U. S. 371, 380.

tions of the State." (Citing *Carroll* v. *Green*, among others). (Italics ours.)

Fourth National Bank v. *Francklyn*, 120 U. S. 747, 756.

That doctrine, of course, is entirely irrelevant to the case at bar so far as the applicability and controlling effect of State statutes of limitations are concerned. It is directly in point and supports the proposition that in interpreting an Act of Congress, the Federal Court in equity will apply its own rule of limitation under 28 U. S. C. A. 723, not those of a State.

Finally, petitioners cite five cases for the proposition that this Court has applied State statutes to equitable actions. In *Clarke* v. *Boorman's Executors*, 18 Wall. 493, the statute was applied to bar an action in equity by the heirs, in a case where their ancestor while living had a clear legal right upon the death of the life tenant whom he survived to bring an action in ejectment.

In *Bacon* v. *Howard*, 20 How. 22, the plaintiffs' assignor, a corporation, "in whose name the action of law could be sustained" was no longer in existence and the plaintiff was thereby compelled to have recourse to chancery and the Court properly said at page 27:

> "He is, of course subject to the same rules or prescription as if he were in a Court of law"

because his assignor's right was barred by the statute and he had no better right than his assignor.

Boone County v. *Burlington*, 139 U. S. 684, was a bill to set aside a decree as fraudulent, holding certain county taxes illegal. On the facts, the Court held the action barred both by laches and by the State statute. The jurisdiction was based on diversity of citizenship.

Pearsall v. *Smith*, 149 U. S. 231, was a proceeding to set aside the transfer of real estate in fraud of creditors. The Court held that the action was barred by the Federal bankruptcy statute, by laches (p. 236) and by the New York equitable fraud statute. The matter involved, of course, was local and the case therefore entirely inapplicable.

Wilson v. *Koontz*, 7 Cranch. 202, was a proceeding in equity to reach a debtor's property in the hands of third parties. The debt itself was barred. This case obviously is one of an equitable action in aid of a legal action and could not be sustained where the legal action was barred.

POINT VI.

The doctrine of the *Erie* and *Ruhlin* cases does not apply to the Federal equitable remedial doctrine of laches, nor does their doctrine apply where, as here, a question of Federal law is involved. Assuming, however, that they do apply and that there is no longer an independent Federal equity jurisdiction even in interpreting a Federal statute and that the Statute of Limitations of the State of New York controls, that state would apply the ten year statute to the case at bar if it arose in that state. The decision below should be affirmed.

Respectfully submitted,

GEORGE A. SPIEGELBERG,
Attorney for Respondents and
Intervenors-Respondents.

New York, N. Y. January 11, 1940.

APPENDIX.

A-I.

Legislative History of New York Statutes of Limitations.

The first limitation statute in this State is contained in Laws of 1788, Chapter 43. No limitation as to suits in equity was contained in that act.

1830

Part 3, Chapter 4, Title II, Article Sixth provided so far as material here three Sections dealing with equitable remedies.

> "Section 49: Whenever there is a concurrent jurisdiction in the Courts of common law and in Courts of equity of any cause of action the provisions of this Title limiting a time for the commencement of a suit for such cause of action in a Court of common law shall apply to all suits hereafter to be brought for the same cause in the Court of Chancery."

The Revisers Report on this section reads as follows:

> "New, adopting the principle and the language of the case 20 J. R. 585, in the Court of errors. It is conceived that every reason for the existence of a statute of limitations as to suits at law applies with greater force to cases of equity, where parol proof is of necessity admitted to a greater extent."

The Section dealing with exclusively equitable remedies was then set forth and reads:

> "Section 50: But the last Section shall not extend to suits over the subject matter of which a court of equity has peculiar and exclusive jurisdiction, and

which subject matter is not cognizable in the Courts of common law."

Revisers Note:

"This qualification, it is presumed, will remove all apprehension of danger from intrenching on the powers of Courts of equity."

"Section 52: Bills for relief in case of the existence of a trust not cognizable by the Courts of common law and in all cases not herein provided for shall be filed within ten years after the cause thereof shall accrue and not after."

1848

The statute remained in that form until the Field Code of 1848 and 1849 was adopted. The Code repealed the articles of the Revised Statutes hereinabove set forth (L. 1848, Ch. 379, Section 66). Sections 50 and 52 of the Revised Statutes, however, found their counterpart in the Field Code of Procedure.

Part 2, Title II, Chapter 3, Section 77* of the Field Code provided:

"An action for relief not hereinbefore provided for must be commenced within ten years after the cause of action shall have accrued."

It is at once obvious that Section 77 (97) of the Field Code is substantially Sections 50 and 52 of the Revised Statutes, and that this similarity is no oversight is apparent from the Revisers Comment on Section 77 (97) (3 Revised Statutes of New York, 3rd Edition, pp. 843 *et seq.*) reading as follows:

* Section 77 of the 1848 Act was renumbered 97 in the 1849 Act.

"(Sec. 77.) This Section is a substitute for the article of the Revised Statutes 'Of the time of commencing suits in Courts of equity' (2Rs. 3d Ed., 398, 399) and provides for all the cases heretofore known as suits in equity, excepting for relief on the ground of fraud; which case has been already provided for in the Sixth Subdivision of Section 71. In that case as well as in those embraced in this Section, the periods of limitation are the same as those now existing, the only difference being that by the present statutes they are applied to the form, while by the proposed section they are made to depend *upon the substance of the remedy.* This will be more apparent from an examination of the existing statutes. See Sec. 49, 50, 51, 52, 2 Rev. Stat. 3rd Ed. 398 etc.". (Italics ours.)

Section 77 in the 1848 Code, which became Section 97 in the 1849 Code was intended to and did perpetuate the meaning and effect of Part 3, Chapter 4, Title II, Article Sixth of the Laws of 1830, Sections 50 and 52 as appears from the Revisers Note dealing with these identical sections quoted above, which removed all equitable causes of action from the purview of any one statute of limitations and placed them under the ten year statute.

Thereafter only one inconsequential change was made in the statute. In 1872 the Court of Appeals in the case of *Everitt* v. *Everitt,* 41 Barb. 385, 394, 395, construed the term "action for relief" as contained in Section 97 of the Field Code of Procedure of 1849 to refer only to actions in equity seeking affirmative relief from a Court of equity and did not include an action in equity to probate a will because such action did not seek affirmative relief. In order to remedy the technical ambiguity of the word "relief" created by the Court in the *Everitt* case, *supra,* and to

embrace all equitable causes of action within the ten year period of limitations, Section 97 of the Field Code of Procedure of 1849 was slightly modified in the Throop Code of Civil Procedure of 1876, 1877, into Section 388 of the Throop Code of Civil Procedure and provided as follows:

> "Section 388. An action, the limitation of which is not specifically prescribed in this or the last Title, must be commenced within ten years after the cause of action accrues."

In proposing this slight modification, the Commissioners reported to the legislature as follows (p. 159 of Commissioners' Report):

> "The Code of Procedure, Section 97 amended by striking out after 'an action' the words 'for relief' which were used in the Revised Statutes in contradistinction to 'for discovery'; but have no definite meaning under our present system; and by substituting the second clause for 'not hereinbefore provided for'. See Brown, J. in *Everitt* v. *Everitt*, 41 Barb, 394, 395."

Present Section 53 of the Civil Practice Act is a repetition of Section 388 of the Throop Code of Civil Procedure of 1876, 1877 without change.

It is clear, therefore, from the statutory history of Section 53 of the Civil Practice Act that it is intended to and does embrace all actions in equity and that none of the other sections of the Civil Practice Act was ever intended to apply to actions solely cognizable in Courts of equity. Civil Practice Act, Section 53, in its original form in the Revised Statutes quoted above expressly so stated. When

simplified into its present form, the Revisers were careful to make it clear to the legislature and to the Courts that it continued to cover all actions in equity and did not change the periods of limitation from those existing prior to the revision. The Courts have carefully observed the distinction thus made.

A-II.

In New York it is the unvarying rule that even though there be a right at law, if equity affords the only adequate remedy, the ten year statute is applicable. Development of two theories of adequate remedy solely in equity. Survival of theory that where no one has adequate remedy at law ten year statute applicable, even though basic cause of action legal.

The development of the applicability of the ten year equitable statute (Civil Practice Act, Section 53) as exemplified by the cases in the New York Court of Appeals presents a fascinating study in judicial precedent.

Prior to a series of cases herein designated as the *Brinkerhoff* cases,[x-1] it was the unquestioned law in New York that with respect to those cases in which the *right* was not exclusively equitable, the ten year equity statute

---

[x-1] *Brinkerhoff* v. *Bostwick*, 88 N. Y. 52; *Brinkerhoff* v. *Bostwick*, 99 N. Y. 185; *Brinkerhoff* v. *Bostwick*, 105 N. Y. 567.

was applicable only where the equitable remedy was the only remedy or the only adequate remedy.[x-2]

It was also the rule until 1882 that if the action was derivative the adequacy of the legal remedy was to be judged according to the remedy available to the party on whose behalf an action was brought.

Hun v. *Cary*, 82 N. Y. 65 (1880).

In the *Hun* case, *supra*, the Court of Appeals rejected the argument that the assets of a corporation were a trust fund and held that an action by a receiver against directors was a legal and not an equitable cause of action.

[x-2] *Appleby* v. *Brown*, 24 N. Y. 143, at pages 144, 154 (1861); *Rundle* v. *Allison*, 34 N. Y. 180 (1866); *Hoyt* v. *Tuthill*, 33 Hun 196 (1884).

In these cases the legal nature of the basic right was recognized. In the *Rundle case, supra*, the Court said at pages 182-183:

> "The action may properly be regarded as one for a recovery. At common law a suit for a legacy did not lie (citing cases). In this State a remedy by action in Courts of law was given by statute as early as 1801 (citing statutes). * * * Under the statute actions of debt for legacies have been frequently entertained (citing cases)."

In the Rundle case, however,

> "by reason of * * * peculiar circumstances the plaintiff had no remedy at law and the limitation of six years is not applicable to the case."

In the *Hoyt* case, *supra*, which was an action by a co-obligor against other co-obligors for contribution, the Court said at page 199:

> "We have seen that an action at law would lie against each of the obligors separately to recover his quota, and of course, such an action would be within the six year statute. In general where there is a legal and an equitable remedy in respect to the same subject matter, the latter is under the control of the same statute bar as the former (citing cases) but the statute bar applicable to equitable remedies will be applied where the legal remedy is imperfect. * * *"

The first *Brinkerhoff* case reported in 88 N. Y. 52, was a derivative action in equity by stockholders of an insolvent bank against directors. The trust fund doctrine of corporate assets was enunciated and upheld and the equitable jurisdiction sustained. A different aspect of the same case came before the Court of Appeals and is reported in 99 N. Y. 185. It involved an interpretation of Code of Civil Procedure, Section 394 (the predecessor of Civil Practice Act, Section 49, Subdivision 4) and the Court held that the use of the word "law" in the statute meant statute law and not common law and that, therefore, the three year statute was inapplicable. Assuming the correctness of this pronouncement, it would seem to follow that the six year statute governing injuries to property (Code of Civil Procedure, Section 382, subdivision 3) was applicable, but this the Court held inapplicable and applied the ten year statute, stating at page 113:

> "The action is against the directors as trustees to call them to account for the manner in which they discharged their trust and is one of which courts of equity always have jurisdiction * * *. There is no doubt therefore" that the ten year statute applies.

This is a reiteration of the "trust fund doctrine" enunciated first in the *Brinkerhoff* case reported in 88 N. Y. Needless to say, the case of *Hun* v. *Cary, supra,* was not cited or discussed in either of these cases and they incorporated temporarily in the law of New York the equitable trust fund theory of corporate assets. They might also be explained on the basis of inadequacy of the legal remedy, but nothing the Court said justifies the applicability of this explanation.

The last *Brinkerhoff* case reported in 105 N. Y. 567, cited the *Brinkerhoff* case in 99 N. Y. with approval and thereby gave lip service to the equitable nature of representative actions against directors seeking to recover corporate assets. While giving lip service to that doctrine, the case, however, marks a turning point in the law of New York because it seriously weakened the trust fund doctrine enunciated in the two prior cases of the same name, cited *Hun* v. *Cary, supra* (which had rejected the trust fund doctrine as a basis for equitable jurisdiction) and distinguished that case by pointing out at page 571 the adequacy of the legal remedy in the *Hun* case and its inadequacy in the case under discussion.

The importance of the stress placed upon the argument of inadequacy of legal remedy as the basis for exclusive equitable jurisdiction cannot be magnified. It was, at least by direct implication, a return to the old and sound New York doctrine making the adequacy of legal remedy the test of the equity Court's jurisdiction and determinative of the proper limitations statute to be applied (See note "X-2").

Some years later, and between 1894 and 1898, the trust fund doctrine of corporate assets received its quietus. This was accomplished by three cases:

> *O'Brien* v. *Fitzgerald*, 143 N. Y. 377; *Mason* v. *Henry*, 152 N. Y. 529; *Dykman* v. *Keeney*, 154 N. Y. 483.

The *O'Brien* case, *supra*, was an action to recover damages against directors for negligence. The Court expressly rejects the trust fund doctrine of corporate assets. Instead of directly overthrowing the *Brinkerhoff* cases,

(and it is to be noted that the Court in the *O'Brien* case cited only the report in 105 N. Y., which it will be remembered was the *Brinkerhoff* case least vigorously enunciating the trust fund doctrine) the Court of Appeals undertook to distinguish that *Brinkerhöff* case and suggested that a derivative action by stockholders might well be exclusively in equity. It is well to point out that up to this point only the *Brinkerhoff* case in 99 N. Y. was concerned with the appropriate statute of limitations.

In the *Mason* case, *supra*, however, the appropriate limitation statute was directly involved. The Court again rejected the trust fund doctrine holding that:

> "The actual and real relationship between them" (the directors) "and the corporation is that of agents acting for their principals" (pp. 534, 535)

and again in distinguishing the *Brinkerhoff* cases, said in referring to the position of a stockholder in a derivative action at page 537:

> "He could not sue at law but must sue in equity. His right of action is purely of an equitable character."

Whatever doubt may have existed as to the disappearance of the trust fund doctrine was laid at rest in the *Dykman* case, *supra*, which directly states at pages 490 and 491 that an action in equity would not lie because of the nature of the parties' relationship (the trust fund doctrine) but would where the legal remedy was inadequate. Again, however, the Court distinguished the *Brinkerhoff* cases by stating that the derivative stockholders' action was necessarily in equity.

Because of these considered dicta, if they be dicta, the lower Courts following the *Brinkerhoff* cases uniformly held, as late as 1937, that the ten year statute was applicable to derivative stockholders' actions, even though had the corporation brought the action, its remedy at law would have been entirely adequate. Two recent cases clearly illustrate the exact correctness of this statement.

Goldberg v. *Berry*, 231 App. Div. 165;
Chance v. *Guaranty Trust Co.*, 164 Misc. 346, *affirmed* 251 App. Div. 855.[x-3]

The twin doctrines thus established were clarified in 1937.

Potter v. *Walker*, 276 N. Y. 15.

Before discussing the *Potter* case, *supra*, the chronology of the equitable jurisdiction over actions against directors had been as follows:

First, the directors of a corporation were its agents and an action at law was alone appropriate (*Hun* v. *Cary*, *supra*) where the legal remedy afforded the corporation was adequate[x-4].

Second, the corporate assets were a trust fund, the directors trustees and the action necessarily in equity (*Brinkerhoff*, 88 N. Y., *supra*) and the ten year statute applied (*Brinkerhoff*, 99 N. Y., *supra*). This doctrine was shaken in the next *Brinkerhoff* case (105 N. Y., *supra*), which did

---

[x-3] The Court will bear in mind that the Appellate Division reversed itself as to the applicable statute after the decision in *Potter* v. *Walker*. See Note 41 in brief.

[x-4] See note "X-2" p. vi.

not involve statute of limitations but which based the equitable jurisdiction upon the inadequacy of the legal remedy and not upon the trust fund doctrine. It did this in order to distinguish *Hun* v. *Cary, supra,* which it cited, from the two earlier *Brinkerhoff* cases which had failed to cite the *Hun* case.

Third, the *O'Brien, Mason* and *Dykman* cases gave the trust fund doctrine its final quietus and without overruling the *Brinkerhoff* cases distinguished them on the ground that they were stockholders derivative actions, stating that if the action were a stockholders' derivative action, it was necessarily in equity. Furthermore, the *O'Brien* and *Dykman* cases affirmatively asserted the old sound New York doctrine that inadequacy of legal remedy would be ground for equitable jurisdiction, even if the action were not derivative but were brought by the corporation.

The *Potter* case, *supra,* affirmatively upholds the doctrine that where the legal remedy is inadequate, or absent, the ten year statute is applicable and the jurisdiction exclusively equitable.

The Court will remember that in that case stockholders brought a derivative action against a number of directors alleging that some had wrongfully appropriated property belonging to the corporation, while others had merely been negligent. As to the former, the Court of Appeals applied the ten year statute of limitations on the ground that the plaintiffs had no adequate legal remedy with respect to them. As to the latter, it applied the six year statute holding that the legal remedy of the corporation was adequate. The decision definitely ends the authority of those cases which followed the *Brinkerhoff* cases and the dicta in the

O'Brien, Mason and *Dykman* cases, which held that the derivative nature of an action constituted it exclusively equitable and the ten year statute applicable. It affirmatively upholds the long standing New York doctrine that if the legal remedy is inadequate, the equitable statute applies irrespective of who brings the action.

It is unfortunate that the language of the Court of Appeals in the *Potter* case, *supra,* does not fully reveal the meaning of the Court without an analysis of the language in the Appellate Division and the history behind the decision which has been here set out.

In the Appellate Division decision of the *Potter* case, 252 App. Div. 244, subsequently affirmed by the Court of Appeals, it was held that the derivative nature of the action did not determine the statute to be applied, but that the true test was whether the remedy at law was or was not "as complete or effective as the remedy in equity" with respect to the party whose right was actually in litigation, that is, in the case of a derivative action, the right of the corporation. The Court of Appeals applied the same test and relied on the *Hanover Fire Insurance Company* case,[x-5] in upholding the adequacy of remedy test. It affirmed the action of the Appellate Division in completely overthrowing the New York doctrine originated in the *Brinkerhoff* cases that the ten year statute applied to derivative actions, as such, relying on *Wallace* v. *The Lincoln Savings Bank,* 89 Tenn. 630, written by Mr. Justice Lurton.

Though the meaning of the *Potter* case, *supra,* can be only understood if the facts of that case and the historical

---

[x-5] *Hanover Fire Ins. Co.* v. *Morse Dry Dock & Repair Co.,* 270 N. Y. 86.

background is appreciated, it has been almost uniformly correctly interpreted in the short time since its decision.[x-6]

From the foregoing analysis it is obvious that where there is no adequate legal remedy, and that there is none in the case at bar has been decided by this Court (*Cago* v. *Brusselback*, 85 F. (2d) 20, *certiorari* denied 299 U. S. 586), the ten year statute will be applied by the New York Courts. Moreover, this Court has decided that an action at law may not be brought by anyone under 12 U. S. C. A. Section 812[x-7] and, therefore, not only is a legal remedy inadequate in the case at bar but totally absent. Where this is so, the New York Courts as we have shown would hold the action solely cognizable in equity and the ten year statute alone applicable.

[x-6] *Cwerdinski* v. *Bent*, 256 App. Div. 612, affirmed by Court of Appeals November 14th, 1939, where the corporation had an adequate legal remedy in a legal action for money had and received and the six year statute was applied.

Dunlop v. *Dunlop*, 172 Misc. 66, where the equitable ten year statute was applied in a derivative action because (p. 68)

> "full and complete relief can only be obtained in an equitable action because of its wider scope and latitude."

Mencher v. *Richards*, 256 App. Div. 280, involving Civil Practice Act, Section 49, Subdivision 4; to the effect that the ten year statute will be applied where the legal remedy is inadequate.

[x-7] *Wheeler* v. *Greene*, 280 U. S. 49; *Cago* v. *Brusselback*, 85 F. (2d) 20, *certiorari denied*, 299 U. S. 586; *Christopher* v. *Brusselback*, 302 U. S. 500.

A-III.

Statutes Involved.

12 U. S. C. A., Section 812 provides:

"Individual liability of shareholders. Shareholders of every joint-stock land bank organized under this chapter shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such bank to the extent of the amount of stock owned by them at the par value thereof, in addition to the amount paid in and represented by their shares."

28 U. S. C. A., Section 384 provides:

"Suits in equity, when not sustainable. Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law."

28 U. S. C. A., Section 723 provides:

"Mesne process; proceedings in equity and admiralty. The forms of mesne process and the forms and modes of proceeding in suits of equity and of admiralty and maritime jurisdiction in the district courts shall be according to the principles, rules and usages which belong to courts of equity and of admiralty, respectively, except when it is otherwise provided by statute or by rules of court made in pursuance thereof; but the same shall be subject to alteration and addition by the said courts, respectively, and to regulation by the Supreme Court, by rules prescribed, from time to time, to any district court, not inconsistent with the laws of the United States."

28 U. S. C. A., Section 724 provides:

"Conformity to practice in State courts. The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding."

28 U. S. C. A., Section 725 provides:

"Laws of States as rules of decision. The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

New York Civil Practice Act, Section 48 provides:

"Actions to be commenced within six years.

"The following actions must be commenced within six years after the cause of action has accrued:

"1. An action upon a contract obligation or liability express or implied, except a judgment or sealed instrument.

"2. An action to recover upon a liability created by statute, except a penalty or forfeiture.

"3. An action to recover damages for an injury to property, or a personal injury, except in a case where a different period is expressly prescribed in this article.

"4. An action to recover a chattel.

"5. An action to procure a judgment on the ground of fraud. The cause of action in such a case is not deemed to have accrued until the discovery by the plaintiff, or the person under whom he claims, of the facts constituting the fraud.

"6. An action to establish a will. Where the will has been lost, concealed or destroyed, the cause of action is not deemed to have accrued until the discovery by the plaintiff or the person under whom he claims of the facts upon which its validity depends.

"7. An action upon a judgment rendered in a court not of record, except where such judgment shall have been docketed in a county clerk's office of this state upon a transcript filed therein pursuant to law. The cause of action in such a case is deemed to have accrued when final judgment was rendered."

New York Civil Practice Act, Section 49, Subdivision 4, provides:

"4. An action against a director or stockholder of a moneyed corporation, or banking association, to recover a penalty or forfeiture imposed, or to enforce a liability created by the common law or by statute. The cause of action is not deemed to have accrued until the discovery by the plaintiff of the facts under which the penalty or forfeiture attached or the liability was created."

New York Civil Practice Act, Section 53 provides:

"Limitation where none specially prescribed. An action, the limitation of which is not specifically prescribed in this article, must be commenced within ten years after the cause of action accrues."

New York Civil Practice Act, Section 195 provides:

"Suing for benefit of others. Where the question is one of a common or general interest of many persons or where the persons who might be made parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."